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## SURUHANJAYA SEKURITI MALAYSIA v. SREESANTHAN ELIATHAMBY

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[CIVIL SUIT NO: WA22NCC-348-10-2016]
B 22 JUNE 2021

***SECURITIES:*** *Insider trading – Insider trading prohibition – Legal firm received instructions to commence preparation of transaction documentation – Proposed privatisation of listed subsidiary – Lawyer came into possession of information on*
C *proposed privatisation of listed subsidiary – Lawyer acquired and later sold off shares – Whether lawyer purchased shares while in possession of material non-public information – When trading prohibition takes effect – Whether lawyer came into possession of material non-public information – Whether lawyer knew or ought to have known that information was not generally available – Whether lawyer in*
D *contravention of trading prohibition – Whether mens rea ingredient ought to be proven – Whether ingredients of trading prohibition satisfied – Securities Industry Act 1983, ss. 89E & 90*

The Securities Commission Malaysia ('plaintiff') sought to make the defendant liable in a civil action for insider trading. The defendant was a
E corporate lawyer and a partner at Kadir Andri & Partners ('firm'). In March 2006, CIMB Investment Bank Bhd ('CIMB') came up with a plan for the privatisation of Worldwide Holdings Bhd ('WHB'), a public company listed on Bursa Malaysia Securities Bhd. Approximately 51% of WHB's shares were held by Perbadanan Kemajuan Negeri Selangor ('PKNS') and WHB
F was the only subsidiary of PKNS. PKNS was chaired by the Menteri Besar of Selangor. The representatives of CIMB met with the defendant to obtain advice on legal aspects of the proposed privatisation. Among the matters discussed was the manner in which the privatisation would take place, whether by way of scheme of arrangement under s. 176 of the Companies Act
G 1965 or by way of selective capital reduction. About a month later, the representatives of CIMB met with the Menteri Besar to present their plan for the proposed privatisation. Around this time, several telephone conferences took place between the CIMB representatives and the defendant. It was the plaintiff's case that, during these interactions between the CIMB personnel
H and the defendant, the defendant came into possession of the information that PKNS was proposing to privatise its listed subsidiary and that because WHB was the only listed subsidiary of PKNS, the defendant had deduced the identity of WHB. The defendant acquired 600,000 shares in WHB between 7 June and 11 July 2006. According to the plaintiff, the defendant contravened the insider trading provisions in s. 89E of the Securities Industry
I Act 1983 ('Act') (now repealed by the Capital Markets and Services Act

2007) by purchasing the WHB shares while in possession of material non-public information. On 23 June 2006, the firm received instructions from CIMB to commence the preparation of the transaction documentation for the proposed privatisation and to prepare the documentation required for the court application in respect of the scheme of the arrangement. Between 16 June 2006 and 27 June 2006, the defendant was overseas and away from the office. On 19 August 2006, The Star published an article stating that WHB was to be privatised by PKNS. Trading in the shares of WHB was suspended on 22 August 2006 and the next day, the Board of Directors of WHB announced that it had received a letter from PKNS stating its intention to privatise it by way of a scheme of arrangement. The defendant sold his shares in September 2006, from which a gain of approximately RM678,134 was recorded before transaction costs. The defendant argued, among others, that: (i) at the time he traded in the WHB shares, he did not know the identity of PKNS or WHB and the roles they played in the proposed privatisation; (ii) the information leading to the proposed privatisation was generally available; (iii) the information relating to the proposed privatisation did not have any material effect on the price or value of the shares in WHB; (iv) he bought the WHB shares not based on inside information but based on investment research report issued by CIMB Securities Sdn Bhd obtained from his remisier and in order to become entitled to the dividends that had been declared; (v) the proceedings herein had been improperly commenced as only the Attorney General ('AG') may bring any action for any offence allegedly to have been committed in accordance with art. 145(3) of the Federal Constitution ('FC'); and (vi) s. 90 of the Act was unconstitutional to the extent that it purported to empower the plaintiff to bring proceedings against any person for contravention of the insider trading laws when the power to prosecute lay within the prerogative of the AG in accordance with the terms of the FC.

**Held (granting orders; ordering defendant to pay sum of RM2,989,402 to plaintiff and barring him from becoming a director of any public listed company for a period of ten years):**

**(1)** The insider trading prohibition under Malaysian law does not create strict liability offences. *Mens rea* is still an ingredient to be proven in order to establish contravention of the insider trading laws. To establish *mens rea* for the purposes of the trading prohibition, it has to be proven that the accused or defendant knew or ought reasonably to know that the information in his possession was not generally available. No requirement rises for the prosecution or the plaintiff to prove intention to use the inside information as intent to use does not form part of any element of the trading prohibition. The defendant was in possession of material non-public information before the first trade in the WHB shares was effected on 7 June 2006. He also knew or ought to have known that the information was not generally available. He was therefore liable under s. 89E(2) of the Act. (paras 69 & 177)

**(2)** The plaintiff had established that the defendant obtained the information that there was a proposal for PKNS to privatise a listed subsidiary from personnel of CIMB on two separate occasions, namely: (i) in a meeting between the defendant and the employees of CIMB at the material time, Mr Tan and Mr Ong; and (ii) through a series of telephone conversations between Mr Ong, Mr Tan and the defendant which occurred around the time when the proposed privatisation was presented by CIMB to the Menteri Besar on June 2006. According to Mr Ong and Mr Tan, they had told the defendant the identity of PKNS. From the information he obtained from CIMB, the defendant deduced that the listed subsidiary of PKNS that was to be taken private was WHB. It would have been a simple matter for the defendant, a sophisticated corporate lawyer, to have made the deduction that because PKNS only had one listed subsidiary, the target company in question must have been WHB. (paras 77, 78, 82 & 89)

**(3)** The defendant's staff, Miss Koh had been asked by the defendant to undertake some preliminary work for proposed privatisation codenamed 'Project State'. Miss Koh emailed to the defendant a summary of the material provisions of the Selangor State Development Corporation Enactment 1964 ('Enactment'), the Enactment by which PKNS was incorporated. This clearly showed that the defendant must have known that the proposed privatisation involved PKNS, which corroborated the testimonies of Mr Ong and Mr Tan. If the defendant had not known the identity of PKNS, it would have been impossible for him to have instructed Miss Koh to prepare a summary of the Enactment. (para 93)

**(4)** Evidence showed that by 28 June 2006, the lawyers at the firm, including the defendant knew not only that it was PKNS that was undertaking the proposed privatisation but also that the company that was to be taken private was WHB. The shares in WHB were acquired by the defendant between 7 June 2006 and 11 July 2006. The plaintiff had proven on a balance of probabilities that, at the time the defendant acquired these shares, he possessed information that a privatisation exercise was being proposed to PKNS by CIMB and that the company to be taken private was its listed subsidiary, WHB. The element of the trading prohibition – that the defendant had in his possession information that PKNS proposed to privatise WHB – had been made out. (paras 103, 104 & 112)

**(5)** In order to establish contravention of the insider trading prohibitions, it has to be proven that the information in question was not generally available at the time the act complained of was committed. The element of the trading prohibition was satisfied for the following reasons (i) any reasonable person in the position of the defendant as a vastly

experienced corporate lawyer ought to have known that information communicated to him in contemplation of a corporate proposal that had not yet been announced would be information that was not generally available. It was inconceivable that the defendant did not know that the information about the proposed privatisation was not generally available at the time that the trades in question were effected. Indeed, in own his witness statement, he acknowledged that information that were the subject of discussions with investment bankers regarding corporate proposals would be 'commercially sensitive' information; (ii) the engagement was assigned the code name 'Project State'. It would be legitimate to infer that, if a person knew that a code name had been assigned to an engagement involving a publicly listed entity, then the information relating to that engagement would not only be confidential and commercially sensitive, but would also be information that is not yet publicly announced; and (iii) Miss Koh testified that she had been directed by the defendant to remove the names of the parties from the draft joint venture agreement that she had prepared, from which it could be inferred that the defendant was cognisant of the need to maintain the confidentiality of the information obtained by the firm in relation to the engagement and of the need to reduce the likelihood of material information being inadvertently released to non-authorised persons prior to a public announcement. (paras 113 & 129)

**(6)** The final element of the trading prohibition is the materiality of the information that was in the possession of the defendant. The information relating to the proposed privatisation by PKNS was material information within the meaning of s. 89E(1)(a) of the Act for the following reasons: (i) the fact that there was a sharp increase in the share price following the publication of the Star article and the announcement on 23 August 2006 was evidence that the information regarding the privatisation was material; (ii) it would have been in the reasonable contemplation of a reasonable investor that, if PKNS was proposing to undertake a privatisation, it would have to offer, or cause to be offered, a price to the other shareholders in WHB that would be at a significant premium over the market price at the time, in order for there to be sufficient incentive for them to vote in favour of the privatisation. Accordingly, the fact that PKNS was contemplating a privatisation of WHB was, without more, information that a reasonable person would expect to have a material effect on the price of WHB shares. It was not necessary for the plaintiff to prove that the defendant knew, at the time he traded in the WHB shares, which route the privatisation was to take, or what the offer price of the shares was to be. (paras 130 & 135)

**(7)** The expression 'offence' in art. 145(3) of the FC means a crime or breach of law giving rise to criminal penalties, and that as a consequence 'proceedings for an offence' refers to criminal proceedings. Based on a proper construction of the Act, proceedings commenced pursuant to s. 90 of the Act was not criminal in nature. The penalty provision for insider trading offences was contained in s. 89E(4) of the Act. The juxtaposition of the words offence and conviction in s. 89E(4) made it doubly clear that any contravention of the insider trading prohibitions was a crime. However, contravention of the insider trading prohibitions also gave rise a statutory cause of action in favour of the plaintiff. This cause of action was civil in nature. This was provided in s. 90(1) of the Act. The plain words used in s. 90(1) made it clear that any civil proceedings for contravention of, say, s. 89E was distinct from a prosecution of a contravention of that same section as an offence. The institution of civil proceedings do not require the consent of the Attorney General. The present proceedings were not considered as amounting to 'proceedings for an offence'. Nor was it improperly instituted on the basis that the consent of the Attorney General was not obtained. Section 90 of the Act 1983 was not inconsistent with art. 145(3) of the FC and therefore did not contravene art. 4. (paras 190-195 & 197-199)

**Case(s) referred to:**

*Gammon (Hong Kong) Ltd v. AG of Hong Kong [1985] AC 1* ***(refd)***
*Hooker Investments Pty Ltd v. Baring Brothers Halkerston Securities Ltd [1986] 10 ACLR 462* ***(refd)***
*Lew Chee Fai Kelvin v. Monetary Authority of Singapore [2012] SGHC 12* ***(refd)***
*Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC* ***(refd)***
*PP v. Ng Chee Kheong [1999] SGHC 204* ***(refd)***
*R v. Doff [2005] NSWCCA 119* ***(refd)***
*R v. Evans & Doyle [1999] VSC 488* ***(refd)***
*R v. Farris [2015] WASC 251* ***(refd)***
*R v. Firns 38 ACSR 223* ***(refd)***
*R v. Rivkin (2004) 59 NSWLR 284* ***(refd)***
*Warner v. Metropolitan Police Commissioner [1969] 2 AC 256* ***(refd)***

**Legislation referred to:**

Capital Markets and Services Act 2007, s. 184(1)
Companies Act 1965 (repealed), s. 176
Companies Act 2016, s. 366
Evidence Act 1950, s. 114(g)
Federal Constitution, arts. 4, 145(3)
Securities Industry Act 1983 (repealed), ss. 89, 89A, 89B, 89E(1)(a), (b), (2)(a), (3), (4), 89O(2)(a), 90(1), 90A(5)(a), 100(1)(kk)
Securities Industries Act [Sing], s. 103(1)
Securities Industry Act 1980 [NSW], s. 128

*For the plaintiff - SM Shanmugam, CK Lung, Siew Hui Yi, Mageswary Karropiah & Daniel Arif Tung; M/s Lee Hishammuddin Allen & Gledhill*
*For the defendant - Gopal Sreenevasan, Mark Lau & Talitha Shim; M/s Sreenevasan Young*

*Reported by Lina E*

## JUDGMENT

**Azizul Azmi Adnan J:**

### Introduction

**[1]** The plaintiff in this case, the Securities Commission Malaysia, sought to make the defendant liable in a civil action for insider trading.

**[2]** The defendant, Mr Sreesanthan Eliathamby, is a corporate lawyer of some considerable repute. At the material time, he was a partner of the law firm of Kadir Andri & Partners. He also headed its corporate department.

**[3]** In March 2006, CIMB Investment Bank Berhad (referred to here as "CIMB") came up with a plan for the privatisation of Worldwide Holdings Berhad.

**[4]** At the time, Worldwide Holdings Berhad was a public company listed on Bursa Malaysia Securities Berhad, the Malaysian stock exchange. Approximately 51% of its shares were held by Perbadanan Kemajuan Negeri Selangor ("PKNS"), the state development agency for Selangor. PKNS is chaired by the Menteri Besar of Selangor. Worldwide Holdings Berhad was the only listed subsidiary of PKNS.

**[5]** On 5 May 2006, representatives of CIMB met with the defendant to obtain advice on legal aspects of the proposed privatisation. Among the matters discussed was the manner in which the privatisation would take place, whether by way of a scheme of arrangement under s. 176 of the Companies Act 1965, or by way of a selective capital reduction.

**[6]** About a month later, on 7 June 2006, the representatives of CIMB met with the Menteri Besar to present their plan for the proposed privatisation.

**[7]** Around this time, between 6 to 8 June 2006, several telephone conferences took place between the CIMB representatives and the defendant.

**[8]** It was the Commission's case that, during these interactions between the CIMB personnel and the defendant, the defendant came into possession of information that PKNS was proposing to privatise its listed subsidiary, and that because Worldwide Holdings Berhad was the only listed subsidiary of PKNS, the defendant had deduced the identity of Worldwide Holdings Berhad.

**[9]** The defendant acquired 600,000 shares in Worldwide Holdings Berhad in June and July 2006. These shares were acquired in two tranches:

(i) 200,000 shares were acquired between 7 June 2006 and 13 June 2006, at the purchase price per share of between RM1.95 and RM1.96; and

(ii) 400,000 shares were acquired between 29 June 2006 and 11 July 2006 at the purchase price per share of between RM2.1242 and RM2.2415.

**[10]** On 23 June 2006, Kadir Andri & Partners received instructions from CIMB to commence the preparation of the transaction documentation for the proposed privatisation and to prepare the documentation required for the court application in respect of the scheme of arrangement.

**[11]** Between 16 June 2006 and 27 June 2006, the defendant was overseas and away from the office.

**[12]** On 19 August 2006, the daily newspaper the Star published an article that stated that Worldwide Holdings Berhad was to be privatised by PKNS.

**[13]** Trading in the shares of Worldwide Holdings Berhad was suspended on 22 August 2006. A day later, on 23 August 2006, the board of directors of Worldwide Holdings Berhad announced that it had received a letter from PKNS stating its intention to privatise it by way of a scheme of arrangement.

**[14]** Prior to the suspension of trading, the shares in Worldwide Holdings Berhad were traded with a closing price of RM2.54 per share on 21 August 2006. The price at which PKNS offered to buy out the minority shareholders in the company was RM3.50, as disclosed in the announcement of 23 August 2006. When trading in the shares of Worldwide Holdings Berhad resumed on 25 August 2006, the opening price for the shares was RM3.22.

**[15]** The defendant sold his Worldwide shares in September 2006, from which a gain of approximately RM678,134 was recorded (before transaction costs).

**Issues**

**[16]** The Securities Commission contended that the defendant contravened the insider trading provisions in s. 89E(2)(a) of the Securities Industry Act 1983 by purchasing the Worldwide shares while in possession of material non-public information. The Securities Industry Act 1983, which applied at the material time, has since been repealed by the Capital Markets and Services Act 2007, but the insider trading provisions have been substantively re-enacted in the new Act.

**[17]** The defendant argued (among others) that:

(i) at the time he traded in the Worldwide shares, he did not know the identity of PKNS or Worldwide and the roles they played in the proposed privatisation;

(ii) the information relating to the proposed privatisation was generally available;

(iii) the information relating to the proposed privatisation did not have any material effect on the price or value of the shares in Worldwide Holdings Berhad;

(iv) he bought the Worldwide shares not based on insider information but:

(a) based on an investment research report issued by CIMB Securities Sdn Bhd, which he obtained from his remisier, Mr Ravindran Ponnusamy (DW2) who was working with OSK Securities Berhad at the time;

(b) in order to become entitled to the dividends that had been declared;

(v) the proceedings had been improperly commenced by the Securities Commission against the defendant, because only the Attorney General may bring any action for any offence alleged to have been committed, in accordance with art. 145(3) of the Federal Constitution; and

(vi) section 90 of the Securities Industries Act 1983 was unconstitutional to the extent that it purported to empower the Securities Commission to bring proceedings against any person for contravention of the insider trading laws, when the power to prosecute lay within the prerogative of the Attorney General, in accordance with the terms of the Federal Constitution.

**Summary Of Findings And Decision**

**[18]** I found that the Securities Commission had proven its case against the defendant, and that none of the defences had been made out. I granted the orders prayed for by the Commission, which included directing the defendant to pay the sum of RM2,989,402 to the Commission, and barring him from becoming a director of any public listed company for a period of ten years.

**[19]** The findings of the court may be summarised as follows:

(i) I made a finding of fact that the defendant had in his possession information that PKNS proposed to privatise Worldwide Holdings Berhad (see paras. 77 to 112 *post*);

(ii) I found that the information relating to the proposed privatisation that was in the possession of the defendant was not generally available at the time he had traded in the Worldwide shares (see paras. 113 to 127 *post*);

(iii) to establish *mens rea* for the purposes of the insider trading prohibition, it has to be proven that the defendant knew or ought reasonably to know that the information in his possession was not generally available. No

requirement arose for the Securities Commission to prove intention to use the inside information, as intent to use does not form part of any element of the insider trading prohibition (the discussion on the legal principles are set out in paras. 21 to 69 *post*).

On the facts, it was sufficiently established that the defendant knew or ought reasonably to know that the information in his possession was not generally available (see paras. 128 and 129 *post*);

(iv) the information relating to the proposed privatisation by PKNS was material information within the meaning of s. 89E(1)(a) of the Securities Industry Act 1983 because:

(a) there was a sharp increase in the share price following the publication of information relating to the proposed privatisation in the Star article and the announcement on 23 August 2006;

(b) the fact that PKNS was contemplating a privatisation of Worldwide Holdings Berhad was, without more, information that a reasonable person would expect to have a material effect on the price of Worldwide shares, because it was reasonable to deduce that the offer price would be at a premium to the prevailing market price. It was not necessary for the Commission to prove that the defendant knew, at the time he traded in the Worldwide shares, how the privatisation was to be effected, or what the offer price for the shares was to be; and

(c) I preferred the testimony that the plaintiff's expert gave at trial over the evidence of the defendant's expert;

(See paras. 130 to 172 *post*)

(v) the present proceedings did not amount to "proceedings for an offence" within the meaning of art. 145(3) of the Federal Constitution, and hence they need not have been commenced by the Attorney General.

As a corollary, s. 90 of the Securities Industry Act 1983 is not inconsistent with art. 145(3) of the Federal Constitution and therefore does not contravene art. 4 of the Constitution.

(See paras. 188 to 199 *post*)

**[20]** The bases for these findings are explained in detail in the following paragraphs.

### *Mens Rea* In Insider Trading

**[21]** One of the key issues arising in this case is the *mens rea* that needs to be proven in order to establish contravention of the insider trading laws. This issue was a key question of law arising in this case, and a consequence I considered that it would be appropriate to address it specifically, and in advance of the discussion on the findings of facts.

**[22]** Mr Sreenevasan for the defendant argued that the intention to use the inside information was an essential ingredient of the prohibition against insider trading.

**[23]** In my judgment, it was not necessary to do so. The trading prohibition takes effect once a person comes into possession of material non-public information and knows or ought to know that the information is not generally available. If he trades in shares to which that material non-public information relates, he contravenes the trading prohibition. He also commits an offence. This is explained in the following paragraphs.

**The Insider Trading Prohibitions**

**[24]** The insider trading prohibitions was contained in s. 89E of the Securities Industry Act 1983, which was in force at the time of the alleged contravention by Mr Sreesanthan. This Act has since been repealed, but the insider trading provisions have been re-enacted in substantially similar form in Subdivision 2 of Part V of the Capital Markets and Services Act 2007.

**[25]** The two principal insider trading prohibitions are contained in sub-ss. 89E(2) and (3) of the Securities Industry Act 1983. These subsections are reproduced here for ease of reference:

> (2) An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates:
>
> (a) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or
>
> (b) procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.
>
> (3) Where trading in the securities to which the information in subsection (1) relates is permitted on a stock market of a stock exchange, the insider shall not, directly or indirectly, communicate the information referred to in subsection (1), or cause such information to be communicated, to another person, if the insider knows, or ought reasonably to know, that the other person would or would tend to:
>
> (a) acquire, dispose of, or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates; or
>
> (b) procure a third person to acquire, dispose of or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates.

**[26]** In gist, sub-s. (2) prohibits an "insider" from trading in securities in respect of which he or she possesses information that is not generally available, but which if made available would tend to have a material effect

on the price or value of the securities in question. For present purposes, such information is referred to as "material non-public information", as a shorthand. An "insider" is defined in sub-s. (1) as a person who possesses material non-public information and who knows or ought to know that the information is not generally available. The prohibition against an insider from trading when he or she is in possession of inside information is referred to as the "trading prohibition".

**[27]** By contrast, sub-s. (3) enacts the "tipping prohibition". It prohibits a person in possession of material non-public information from communicating that information to another person in circumstances where he knows or ought reasonably to know that the other person would trade in the securities in question or cause someone else to do so. There is an important difference between sub-s. (2) and sub-s. (3): the tipping prohibition applies only to listed securities, whereas the trading prohibition is not so limited. The person communicating the information is customarily referred to as the "tipper", and the recipient the "tippee".

**[28]** The insider trading prohibitions, in their current form, were introduced in 1998[1], by way of amendment to the Securities Industry Act 1983. These provisions traced their genesis to the Australian Corporations Law 1990[2], and marked an important change in the way in which insider trading was regulated. Due to the similarity of our provisions to those contained in the equivalent Australian provisions, cases decided in Australia under the insider trading laws after 1991 would be persuasive in Malaysian courts.

**[29]** Previously, the prohibition against insider trading was based on the fiduciary theory of insider trading: the prohibition operated against a person who owed a duty of loyalty to a company and in circumstances where his exploitation of material non-public information for his personal gain constituted a breach of this duty. Thus, under the previous s. 89 of the Securities Industry Act 1983, it must be shown that the offender was an officer, agent or employee of the company or of a stock exchange and that he had made improper use of specific confidential information acquired by virtue of his position to gain an advantage for himself. Similarly, the old s. 90 required proof of improper use of material non-public information acquired in an official capacity. It is for this reason that the offender is referred to as an "insider", because of the role he plays in the company to which the "inside" information relates. Because the original insider trading offences contained in ss. 89 and 90 of the Securities Industry Act 1983 bear little similarity to the current provisions, care must be taken when referring to cases decided under the old law.

**[30]** By contrast, the new provisions contained a number of innovations. First, the provisions were no longer based on the principle that the wrongdoer must be somehow related to or a fiduciary of the company in question. An "insider" need not be an insider at all: he may well be a stranger to the company. For example, in *R v. Evans & Doyle*[3], the accused Evans was the financial director of MPI Pty Ltd. MPI Pty Ltd discovered nickel sulphide deposits on its mining lease located near Kalgoorlie. Evans proceeded to acquire shares in a publicly listed company, Mt Kersey Mining NL, which owned mining leases in the adjoining tenements. He did so allegedly on the basis that mineral deposits could reasonably be expected to also be contained in the mining leases owned by Mt Kersey and therefore its share price could reasonably be expected to rise once the investing public received and assimilated news of MPI Pty Ltd's discovery. Evans was an "insider" even though he was not an officer of the company in whose shares he traded. For as long as he was in possession of price-sensitive information that was not generally available to investors and he knew that to be the case, he would be subject to the trading and tipping prohibitions[4]. The underlying principle was that insider trading undermines the belief in the fairness of, and the confidence in, the securities market. The long term viability of a securities market is thought to depend on the confidence that participants have in its integrity and their ability to participate in it on level terms. This principle underlying the new legislative philosophy is termed the market integrity or market access theory.

**[31]** The second significant change was that the causal nexus between the inside information and the prohibited conduct was severed: it no longer became necessary for the prosecution or plaintiff to establish that the accused person or defendant had used the inside information for the purposes of trading. There was now a blanket trading prohibition: once a person is in possession of material non-public information and he knows this to be the case, he simply cannot trade on the securities to which the information relates. It does not matter that he had not used the information for the purposes of his trading. As will be seen later, this is a point that is pertinent in the context of the present case.

**[32]** The third significant and related point was that it was no longer necessary to establish the mental element that was previously required under the previous provisions: that the insider had intended to make improper use of insider information for the purposes of attaining a gain or to avoid a loss. Both ss. 89 and 90 of the Securities Industry Act 1983 required proof of the subjective intent of the offender. By contrast, under the present provisions, once it is shown that the accused or the defendant was in possession of material non-public information, that he knew or ought reasonably to know

A that the information was not generally available, and that he had traded in the shares to which that information relates, he would have contravened the trading prohibition and an offence would be established.

**[33]** That this is the case clear from the plain words of s. 89E of the Securities Industry Act 1983. All that is necessary in order to establish *mens* B *rea* for the purposes of the trading prohibition is to prove that the accused or defendant knew or ought reasonably to know that the information in his possession was not generally available (s. 89E(1)(b)).

**[34]** Mr Sreenevasan raised a number of arguments as to why this was an C incorrect conclusion. I address these in the following paragraphs.

***R v. Firns***

**[35]** Mr Sreenevasan referred to the Australian case of *R v. Firns*[5], a decision of the Supreme Court of New South Wales. The brief facts of this case were as follows.

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**[36]** Firns was convicted at the District Court on two counts of insider trading. He appealed. At the time of the commission of the offences for which he had been charged, Firn's father was a director of Carpenter Pacific Resources NL, a company whose shares were listed on the Australian Stock Exchange (ASX). A subsidiary of Carpenter, Matu Mining Pty Ltd, a E company registered in Papua New Guinea, held an exploration licence to mine gold in Papua New Guinea. Within the area covered by the licence was a smaller special mining lease that had been granted to an unrelated company. Initially, the rights under this special mining lease was limited to prospecting for alluvial gold (whereas the licence granted to Matu included F the rights to mine in hard rock). In December 1993, the Papua New Guinea Government enacted regulations that extended the rights of the special mining lease to hard rock, effectively removing Matu's mining rights to the area covered by the special mining lease. Matu challenged this regulation in courts.

**[37]** It was ultimately successful in its appeal. The Supreme Court of Papua G New Guinea handed down its decision in open court at 9.30am on 28 July 1995. Representatives of Matu/Carpenter were present in court, as were reporters and landowners from the affected areas. Firns' father, as an executive director of Carpenter, was immediately informed. He was in Sydney at the time. He then telephoned Firns at 10.08am (who was in H Brisbane) to inform him of the news. Firns then telephoned a stockbroker and effected a purchase of Carpenter shares in the name of his wife (using her maiden name). He also procured a further purchase by a friend, through the same broker.

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**[38]** Carpenter notified the ASX of its successful appeal only on Monday, 31 August 1995. Information on the judgment of the Supreme Court of Papua New Guinea only became available through the stock exchange at about 1.30pm on 28 August 1995, when an unrelated company interested in the judgment gave notification to the ASX. The purchases of the Carpenter shares were effected at 2.5 cents and 3 cents. The same shares were subsequently sold in mid-August for between 6 to 9 cents.

**[39]** The key and determinative issue in this case was whether, at the time Firns traded in the Carpenter shares, the information on the decision of the Papua New Guinea Supreme Court had already become "generally available". If it was, then no liability would attach to Firns.

**[40]** The relevant provision of the Corporations Law explained when information is generally available:

> (2) Information is generally available if:
>
> (a) it consists of readily observable matter; or
>
> (b) without limiting the generality of paragraph (a), both the following subparagraphs apply:
>
> (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of bodies corporate of a kind whose price or value might be affected by the information; and
>
> (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.

**[41]** The NSW Supreme Court in *R v. Firns*, by a majority, held that once the judgment of the Papua New Guinea Supreme Court was pronounced in open court in Port Moresby, that information became readily observable within the meaning of s. 1000B(2)(a) of the Corporations Law. Accordingly, the trial judge fell into error when he directed the jury that the information must be readily observable in Australia in order for it to become generally available. Firns' conviction was set aside.

**[42]** In coming to this decision, the court considered both the report by a parliamentary standing committee known as the Griffith's report and the explanatory memorandum to the Corporations Amendment Bill 1991. The court observed:

> [57] Both the committee and the parliament were concerned not to "penalise individual initiative and diligence": committee report at §4.5.8. However, both committee and parliament rejected a bright line definition. And parliament went further in recognising that, for some types of information, cleverness, swiftness and efficiency are to be encouraged. The committee's call for drafting clarity was also ignored with the insertion of the opaque words "readily observable matter".

**[43]** Having carefully examined the majority judgment in *R v. Firns*, I failed to see how the decision provided assistance to the defendant in the present case. That case was concerned with the question of when information became "generally available", whereas the issue under present consideration was the scope of the mental element that was needed to be proven in an action for insider trading. Indeed, at para. 30 of the judgment, the NSW Supreme Court expressly acknowledged that the knowledge possessed by Firns regarding the availability of the inside information was sufficient to constitute the *mens rea* for the offence.

**[44]** Before leaving this case, two additional observations may be made:

(i) first, the Malaysian insider trading provisions do not contain a reference to "readily observable matter" as constituting information that is generally available, unlike the Australian counterpart. See s. 89A of the repealed Securities Industry Act 1983 and s. 184(1) of the Capital Markets and Services Act 2007;

(ii) secondly, under the Australian provisions, the mental element that must be established is:

> the accused knows or ought reasonably to know:
>
> (i) that the information is not generally available; and
>
> (ii) if it were generally available, it might have a material effect on the price or value of those securities.[6]

By contrast, under the Malaysian insider trading laws, the Commission need not show that the defendant knew or ought reasonably have known that the information might have a material effect on the price or value of the securities to which the information relates. This is because of the definition of "insider" in s. 89E(1), which reads as follows:

> (1) A person is an "insider" if that person:
>
> (a) possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities; and
>
> (b) knows or ought reasonably to know that the information is not generally available.

Under Malaysian laws, the materiality of the information is determined by reference to an objective standard. The accused or defendant (as the case may be) in any case need not be shown to have known that the information would have a material effect on the price or value of securities; it suffices if it is established that he knew that the information was not generally available.

*PP v. Ng Chee Kheong*

**[45]** Counsel for the defendant referred to the Singapore High Court case of *PP v. Ng Chee Kheong*[7] for the proposition that "intention to use the undisclosed information (knowing that the information was price-sensitive and unavailable to the public)" constituted an essential element of the trading prohibition.

**[46]** The first observation that may be made is that, as explained at para. 44(ii) *ante*, the knowledge that must be shown to be possessed by a person standing accused of insider trading is, under Malaysian law, that he knew or ought reasonably to have known that the information was not generally available. It need not be further shown that he knew that the information was material price-sensitive information. It is for the court to determine whether a reasonable person would expect the information, upon being made generally available, would have a material effect on the price or value of securities. Thus, although the materiality of the information remains an element to be proven by the plaintiff or prosecution, knowledge of materiality did not form part of the *mens rea*.

**[47]** In *PP v. Ng Chee Kheong*, two directors of Amcol Holdings Limited, a company listed on the main board of the Stock Exchange of Singapore, were charged with insider trading. It was alleged that the directors had known about an ongoing dispute that Amcol had been having with its Japanese joint venture partner, and had sold shares that they held in Amcol in breach of the insider trading laws.

**[48]** At first instance, the accused persons were acquitted. The prosecution appealed to the High Court. The appeal was heard by Yong Pung How CJ, sitting as a judge of the High Court.

**[49]** The key issue for determination at the High Court was whether s. 103(1) of the Singapore Securities Industry Act created a strict liability offence, as explained by Yong CJ in the following passage:

> The crux of the Prosecution's appeal was that an offence of insider trading under s. 103 of the Act is one of strict liability. Their case was that they only need to prove that the accused person dealt with securities while in possession of information that was price sensitive and not generally available to the public.

**[50]** The court held that insider trading was not a strict liability offence, on the basis that *mens rea* is presumed to be a necessary ingredient unless there are clear words to indicate the contrary. The court referred to a decision of the Judicial Committee of the Privy Council:

A The position in law was admirably stated by Lord Scarman in *Gammon (Hong Kong) Ltd v. AG of Hong Kong* [1985] AC 1 at 14. He noted that the only situation in which the presumption (that *mens rea* was a necessary ingredient of a criminal offence) could be displaced was where the statute was concerned with an issue of social concern. These include public welfare and public safety. He noted that even in these instances, the
B presumption of *mens rea* stands unless it could be shown that the creation of strict liability would be effective in promoting the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

**[51]** Yong CJ concluded his analysis of the legal position in the following
C manner:

In my view the *mens rea* required for an offence of insider trading under section 103 is an intention to use the undisclosed information knowing that the information was price-sensitive and unavailable to the public. However the test to be applied as to whether an accused person possessed such knowledge at the time he made the trade is an objective test. The
D respondents reasons for making the trade must be tested objectively.

**[52]** On the facts, it was also found that, because the Amcol had made an announcement regarding the difficulties that it was facing as a result of the dispute that it had with the Japanese co-venturer (even though the dispute itself was not disclosed), the information was already in the public domain
E by the time the two directors sold their shares in Amcol. The undisclosed portion of the information – that there was a significant dispute with the Japanese co-venturer – was no longer material given the announcement that had been made.

F **[53]** As a result of the decision in *PP v. Ng Chee Kheong*, Singapore amended its laws to specifically legislate that intent to use insider information was not a necessary element in the offence of insider trading. In *Lew Chee Fai Kelvin v. Monetary Authority of Singapore*[8], the Singapore Court of Appeal stated as follows:

Our parliament has made it clear that s. 220 was enacted to legislatively
G overrule the decision in *PP v. Ng Chee Keong* [1999] 2 SLR (R) 1176, which required proof of an "intent to use" the inside information for insider trading (see Singapore Parliamentary Debates (5 October 2001) at cols 2137 and 2138). There is therefore no longer any requirement of proving the *mens rea* to use inside information in order to prove a contravention of either sections 218 or section 219 of the SFA.

H

**[54]** According to Mr Sreenevasan, if Singapore needed express legislation to remove this particular element of *mens rea* from the offence of insider trading, it would follow as a necessary corollary that, absent any similar enactments under Malaysian laws, the element of "intent to use" must form part of the trading prohibition under the Malaysian securities laws.

I

**[55]** I disagree.

**[56]** In my judgment, the trading prohibition contained in s. 89E(2) does not create a strict liability offence. That this is so is clear from the plain words of the statute. Under s. 89E(2), a person who is an "insider" is subject to the trading prohibition. Under s. 89E(1), a person is an insider if he is in possession of material non-public information, and if he knew or ought reasonably to know that the information in his possession was not in the public domain – ie that it was not generally available within the meaning of s. 89A.

**[57]** It must therefore be proven that an accused or defendant knew or ought to have known that the information in question was not generally available. This knowledge of the accused or defendant constitutes the *mens rea* element of the insider trading prohibitions.

**[58]** In *R v. Firns*, the NSW Supreme Court acknowledged that *mens rea* needed to be proven when it stated:

> There was ample evidence of this aspect of *mens rea* which the jury obviously accepted. The appellant knew that the information he obtained from his father would have a material effect on the price of the Carpenter shares and that it had been passed on to him in advance of any announcement to the public.

**[59]** Of course, as explained earlier, under the Corporations Law, the knowledge that must be proven encompasses not only the availability of the information but also its materiality. This is not the case in Malaysia.

**[60]** Indeed, in *Ng Chee Kheong,* Yong CJ had himself accepted that knowledge is capable of constituting the *mens rea* of an offence, when after referring to an academic article on law reform relating to insider trading, he stated:

> Clearly, whatever the academic interpretation, "knowledge" (even if implied by reason of the person's connection) is a necessary ingredient to making out an offence of insider trading under s. 103(1).

**[61]** Accordingly, with the greatest of deference and respect to the High Court of Singapore, I am of the view that it had in *Ng Chee Kheong* proceeded on a misapprehension that, without the element of "intent to use", insider trading would become a strict liability offence. This is not the case in Malaysia, as the law expressly provides for the mental element to be proven: knowledge, actual or constructive, of the insider that the information was not generally available. The main argument of the prosecution in *Ng Chee Kheong* was that insider trading was strict a liability offence, which did not find favour with the court. An alternative argument was also raised, as recorded by the court when it stated:

> In the alternative, even if some level of *mens rea* is required, the prosecution contended that there is no requirement to prove any intention to use the price sensitive information by the insider in his trade.

**[62]** However, this point was not subsequently elaborated upon in the judgment of the court in *Ng Chee Kheong*.

**[63]** It follows therefore that if the trading prohibition, on its true construction, is not one for which liability is strict, the absence of any express provision by the Legislature specifying that proof of "intent to use" is not required is of no particular consequence.

**[64]** A further point that may be made is that the Singaporean provision considered by the court in *Ng Chee Kheong* is premised upon the fiduciary theory of insider trading (which has been explained at paras. 29-30 *ante*), whereas the Malaysian provisions are based upon the principle of parity of information, which I have referred to as the market integrity theory. (The Singapore Court of Appeal in *Lew Chee Fai Kevin v. Monetary Authority of Singapore* referred to these as the person-connected regime and the information-connected regime, respectively.[9]) If the underlying philosophies of the two regulatory regimes are different, it follows therefore that any discussion of legislative intent cannot be adopted unthinkingly from one to the other.

**[65]** I have no reason to doubt that the presumption at common law-as explained by Lord Scarman in *Gammon (Hong Kong) Ltd v. AG of Hong Kong* [10] – that *mens rea* is a necessary ingredient of a criminal offence, applies with equal force in Malaysia. It does not necessarily follow however that the Legislature must expressly state that *mens rea* is not required if it wishes to create an offence for which liability is strict. Whether or not the presumption is displaced is a matter of the proper construction of the provision in question. For example, in *Warner v. Metropolitan Police Commissioner*[11], the House of Lords held by a majority that liability for possession of scheduled drugs under the Drugs (Prevention of Misuse) Act, 1964 was absolute even though there was no provision that expressly disapplied *mens rea*. Even in this case, however, their lordships construed the offence in two alternative ways: first, that possession was a strict liability offence, or secondly that there was indeed an element of *mens rea* that needed to be proven, but that this extended only to knowledge by the accused that he had a matter in his possession, and that it need not be established that he knew that what he had in his possession was a prohibited substance.

**[66]** The final but no less forceful observation that may be made is that nowhere in the insider trading provisions is the expression "intent to use" referred to; nor does it contain any form of words that may be construed as requiring proof of the intent on the part of the insider to use the material non-public information in his possession to trade in the securities in question. It is a cardinal principle of statutory construction that the courts must give effect to the legal meaning of a statute or any of its relevant provisions. In circumstances where the words of a statute are clear, there is no room for the court to go beyond the express language of the statute.

**[67]** This construction of the insider trading provisions is further supported by the views of the authors of *Securities and Financial Services Law*[12], who commented, in relation to the Australian insider trading provisions, as follows:

> 17.12 The prohibition in section 1043A is **triggered by the mere possession of such information, rather than focusing on the 'use' of the information.** The insider trading prohibition applies where a person possesses inside information, and **is not concerned with whether that person uses that information in making a trading decision.** In other words, a person is prohibited from dealing in a Div 3 financial products while he or she possesses non-public price-sensitive information in respect of that product, **even if he or she would have traded irrespective of the information or is trading for a hedging purpose rather than a profit making purpose.** (emphasis added)

**[68]** My conclusion is also supported by judicial *dicta* in the case of *R v. Farris*[13], where the Supreme Court of Western Australia held as follows:

> The effect of section 1043A is to create a class of persons who by reason of their possession of inside information are prohibited from trading: *Mansfield v. The Queen* [2012] HCA 49; (2012) 247 CLR 86. If a person possesses information, that he knows is not generally available and is price sensitive, the prohibition on trading will apply **whether or not he consciously brings to mind that information and its nature at the time he makes a decision to trade in shares.** The reason for the alternative between 'knows' and 'ought to know' is not to deal with lapses of memory or a failure to recall the true nature of information possessed but to deal with the situation where a person possesses inside information and fails to appreciate that it is not generally available or price sensitive where the objectively available circumstances should have led them to that conclusion. (emphasis added)

*Summary*

**[69]** The discussion on the *mens rea* for insider trading may be summarised as follows:

(i) The insider trading prohibitions under Malaysian law do not create strict liability offences. *Mens rea* is still an ingredient to be proven in order to establish contravention of the insider trading laws.

(ii) To establish *mens rea* for the purposes of the trading prohibition, it has to be proven that the accused or defendant knew or ought reasonably to know that the information in his possession was not generally available.

(iii) No requirement arises for the prosecution or the Securities Commission to prove intention to use the inside information, as intent to use does not form part of any element of the trading prohibition.

(iv) This construction of the relevant provisions are supported by:

(a) a plain reading of the clear words used in the statute. It is a cardinal principle of statutory construction that the courts must give effect to the legal meaning of a statute or any of its relevant provisions. In circumstances where the words of a statute are clear, there is no room for the court to go beyond the express language of the statute;

(b) Australian caselaw on provisions that are substantially in *pari materia* with the Malaysian insider trading provisions; and

(c) academic opinion expressed in the leading text for securities and financial services law in Australia.

**The Elements Of The Trading Prohibition**

**[70]** The trading prohibition may be distilled into the following constituent elements:

(i) the Commission must prove that the defendant was in possession of information;

(ii) the Commission must establish that the information in question was not generally available;

(iii) the Commission must prove that the defendant knew or ought reasonably to have known that the information was not generally available.

(iv) it must also be shown that if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities;

(v) the defendant traded in the securities to which the information relates while in possession of the information; and

(vi) the securities in question came within the definition of "securities" applicable at the material time.

**[71]** In relation to the last of these elements, it was not in material dispute that the shares in Worldwide Holdings Berhad were "securities" within the meaning of the Securities Industry Act 1983.

**[72]** At the time the trades in question were effected by the defendant, the expression "securities" in the Securities Industry Act 1983 incorporated by reference the definition for that term contained in the Securities Commission Malaysia Act 1993, which in turn was defined in the following manner:

"securities" means:

(a) debentures, stocks or bonds issued or proposed to be issued by any government;

(b) shares in or debentures of a body corporate or an unincorporated body; or

(c) unit trusts or prescribed investments,

and includes any right, option or interest in respect thereof;

**[73]** This definition was introduced by the Securities Commission (Amendment) Act 2000 (Act A1074), which came into force on 1 July 2000. It remained in force until the enactment of the Capital Markets and Services Act 2007, which came into force on 28 September 2007.

**[74]** The defendant had traded in the shares of Worldwide Holdings Berhad, which is a public company incorporated in Malaysia. The expression "body corporate" in the definition of "securities" includes not just locally incorporated companies but also corporations incorporated overseas. The shares of Worldwide Holdings Berhad were thus indisputably "securities" within the meaning of s. 89E of the Securities Industry Act 1983.

**[75]** In relation to element referred to in para. 70(v), it was not in dispute that the defendant had acquired 600,000 shares in Worldwide Holdings Berhad between 7 June 2006 and 11 July 2006. Whether he did so while in possession of material non-public information was, however, an issue in dispute, which is considered in further detail below.

**[76]** In the following paragraphs, the remaining elements of the trading prohibition are examined, and the legal principles discussed in the preceding paragraphs are applied to the facts of the case.

*Knowledge Regarding PKNS And Worldwide*

**[77]** I found that the Commission had established that the defendant obtained the information that there was a proposal for PKNS to privatise a listed subsidiary from personnel of CIMB Investment Bank Berhad on two separate occasions:

(i) first, a meeting held on 5 May 2006 between Mr Tan Hong Kheng and Mr Ong Liang Heng (both employees of CIMB at the material time), and the defendant;

(ii) secondly, through a series of telephone conversations between Mr Ong, Mr Tan and the defendant between 6 June and 8 June 2006. These telephone conversations occurred around the time when the proposed privatisation was presented by CIMB to the Menteri Besar of Selangor, on 7 June 2006.

**[78]** From the information he obtained from CIMB, the defendant deduced that the listed subsidiary of PKNS that was to be taken private was Worldwide Holdings Berhad.

**[79]** This finding was corroborated by the testimony of the defendant's staff at Kadir Andri & Partners who had prepared a joint venture agreement and who had discussed this agreement with the defendant at the end of June 2006.

**[80]** At the material time, Mr Ong Liang Heng (PW2) was the head of one of the investment banking teams in CIMB. He and his team came up with the idea of undertaking a privatisation of Worldwide Holdings Berhad because its shares were trading less than the value implied by its assets. Mr Ong first approached the defendant as a sounding board for the legal aspects of the privatisation exercise. At the initial stage of discussions, it was contemplated that the privation could be effected either by way of a scheme of arrangement under s. 176 of the Companies Act 1965, or by way of a selective capital reduction.

**[81]** The defendant was a corporate lawyer of considerable repute. It would be no exaggeration to state that he was one of the leading corporate legal minds of his generation, a sought-after legal adviser who was renowned for structuring complex multi-million dollar transactions.

**[82]** Mr Ong and Mr Tan Hong Kheng (PW1), the head of the structured investments department at CIMB, met with the defendant to discuss the proposed privatisation on 5 May 2006. Both of them testified that they had told the defendant the identity of PKNS. Neither of them were able to recall specifically if the identity of the target company, Worldwide Holdings Berhad, was revealed to the defendant. However, PKNS only had one listed subsidiary.

**[83]** Mr Ong was steadfast in his testimony at trial that he had communicated to the defendant the plan for PKNS to privatise its subsidiary. His testimony was not shaken in cross-examination[14].

**[84]** Mr Tan kept a work diary in which he recorded details of meetings attended by him. In this diary, he had written down the word "PKNS" in the entry for the 5 May 2006 meeting. Although Mr Tan was unable to recollect unequivocally whether that the identity of PKNS was communicated to the defendant at the meeting, he testified that, based on his notes for the meeting, the identity of PKNS would have likely been informed to the defendant. According to Mr Tan, if he had written "PKNS" in his notes, then he would have likely informed the defendant of the identity of PKNS[15].

**[85]** Mr Tan also testified that CIMB would have needed to ascertain whether shareholders in Worldwide Holdings Berhad that were related to PKNS would be permitted to vote at the general meeting approving the scheme of arrangement. This was a second reason why Mr Tan said it was likely that the identity of PKNS would had been revealed to the defendant at the 5 May 2006 meeting.

**[86]** Mr Ong and Mr Tan met the Menteri Besar of Selangor on 7 June 2006 to present their proposal for the privatisation of Worldwide Holdings Berhad. The evidence received at trial showed that Mr Ong had made several calls to the defendant both before and after the meeting with the Menteri Besar. Mr Tan's notebook records a telephone conference having taken place around this time between Mr Ong, Mr Tan, Mr Ho Tat Heng (PW3, who was another officer from CIMB) and the defendant regarding the proposed privatisation and the relative merits of effecting the privatisation *via* a scheme of arrangement versus a selective capital reduction.

**[87]** The interaction between the defendant and the personnel of CIMB as described in the preceding paragraphs establish that the defendant was informed regarding a proposed privatisation involving a listed subsidiary of PKNS. From this information, the identity of that listed company could have easily been deduced, because PKNS only had one listed subsidiary.

**[88]** In *Hooker Investments Pty Ltd v. Baring Brothers Halkerston Securities Ltd*[16], a case decided under s. 128 of the NSW Securities Industry Act 1980, Young J stated that information encompassed "the factual knowledge either of a concrete kind or that obtained by means of a hint or veiled suggestion from which one can impute other knowledge". The expression information was subsequently defined widely in the Australian Corporations Law 1990 to include "matters of supposition". This definition ultimately found its way into our Securities Industry Act 1983, s. 89 of which provided as follows:

**Section 89. Information**

For the purposes of this Division, "information" includes:

(a) matters of supposition and other matters that are insufficiently definite to warrant their being made known to the public;

(b) matters relating to the intentions, or likely intentions, of a person;

(c) matters relating to negotiations or proposals with respect to:

(i) commercial dealings; or

(ii) dealing in securities;

(d) information relating to the financial performance of a corporation;

A (e) information that a person proposes to enter into, or has previously entered into one or more transactions or agreements in relation to securities or has prepared or proposes to issue a statement relating to such securities; and

(f) matters relating to the future.

B **[89]** It would have been a fairly simple matter for the defendant, as a sophisticated corporate lawyer, to have made the deduction that, because PKNS only had one listed subsidiary, the target company in question must have been Worldwide Holdings Berhad.

C **[90]** The foregoing paragraphs establish that the defendant, through his interaction with personnel from CIMB, had in his possession information relating to the proposed privatisation by PKNS prior to trading in the shares of Worldwide Holdings Berhad. (It will be recalled that the shares were purchased in a period between 7 June 2006 and 11 July 2006.)

D **[91]** In addition, there was direct evidence from the defendant's staff at Kadir Andri & Partners which established that:

(i) as early as 15 June 2006, the defendant knew the identity of PKNS, which corroborated the testimonies of Mr Ong and Mr Tan; and

E (ii) the defendant knew, at the very latest by 28 June 2006, that the target company was Worldwide Holdings Berhad.

**[92]** This is explained in the following paragraphs.

**[93]** At the material time, Ms Koh Poi San (PW8) was an associate in Kadir Andri & Partners who worked under the defendant. On 15 June 2006, she F emailed to the defendant a summary of the material provisions of the Selangor State Development Corporation Enactment 1964. This is the Enactment by which PKNS was incorporated. Ms Koh testified that she had been asked by the defendant to undertake some preliminary work for "Project State", which was the codename given to the proposed privatisation. G This clearly showed that the defendant must have known that the proposed privatisation involved PKNS, which corroborated the testimonies of Mr Ong and Mr Tan, who had stated that the identity of PKNS had been communicated to the defendant. If the defendant had not known of the identity of PKNS, it would have been impossible for him to have instructed H Ms Koh to prepare a summary of the Selangor State Development Corporation Enactment 1964.

**[94]** The evidence further showed that, not only did the defendant know that the proposed privatisation was to have been undertaken by PKNS, but that the company to be privatised was Worldwide Holdings Berhad.

I

**[95]** Kadir Andri & Partners was engaged to advise CIMB on the proposed privatisation. Part of its scope of work was to draft a Joint Venture Agreement (JVA). (The privatisation involved PKNS selling its entire stake in Worldwide Holdings Berhad to a special purpose vehicle (SPV). In return, the SPV would issue ordinary shares and redeemable preference shares (RPS) to PKNS. The SPV would simultaneously issue RPSs to a CIMB-related entity, the proceeds of which would be used by SPV to fund the acquisition of the remaining shares in Worldwide Holdings Berhad not already owned by the SPV. The JVA was to govern the relationship between CIMB and PKNS *vis-à-vis* the SPV.)

**[96]** On 23 June 2006, Mr Ho Tat Heng from CIMB emailed to Kadir Andri & Partners a draft presentation to the board of directors of PKNS on the proposed privatisation. These presentation slides were to be used by Kadir Andri & Partners for the purpose of preparing the JVA.

**[97]** The first draft of this JVA was prepared by Ms Koh and emailed to the defendant's secretary on 28 June 2006. Evidence was received at trial that the defendant would review documents in printed form, which was why the draft JVA was emailed to the defendant's secretary.

**[98]** This first draft JVA identified Worldwide Holdings Berhad as the company that was to be the subject of the privatisation exercise. It also identified PKNS as a party to the JVA. At trial, Ms Koh testified that she must have obtained this information from the defendant. Crucially, the presentation slides that were given to Kadir Andri & Partners by CIMB did not identify the target company as Worldwide Holdings Berhad. Ms Koh further testified that she had not, at this stage, had any direct discussions with personnel from CIMB, suggestive of the fact that the only way that she could have known that the target company was Worldwide Holdings Berhad was if she had been told of that fact by the defendant. Ms Koh also subsequently prepared a revised draft JVA on 30 June 2006. In this second draft, the references to the parties' names were removed. Ms Koh testified that she had done so at the instructions of the defendant.

**[99]** Under cross-examination, Ms Koh conceded that the initial instructions to prepare the JVA may have come from Mr Adrian Chair[17] (who was another partner in the firm), because the defendant was away at this time (see below). She also agreed that Mr Chair may have mentioned the name Worldwide to her[18]. (Mr Chair himself testified that he had deduced that Worldwide Holdings Berhad was the target company, and that no one had had told him this information.) Nevertheless, her testimony that she had discussed the first draft JVA (which contained the names of the entities) with the defendant and that it was the defendant who had instructed her to remove those names, remained unshaken.

**[100]** I saw no reason to disbelieve the testimony of Ms Koh. She did not have any particular motive to be untruthful in her answers.

**[101]** It was not in dispute that the defendant had been overseas between 16 June 2006 to 27 June 2006, as evident by the entries in his passport, a copy of which had been tendered to court. The defendant had requested another partner in Kadir Andri & Partners, Mr Adrian Chair (PW4), to oversee the work relating to the proposed privatisation in the defendant's absence. It will be recalled that Kadir Andri & Partners only received instructions to commence work on the documentation for the proposed privatisation on 23 June 2006. The defendant was not copied in the e-mail correspondence between personnel of CIMB and Kadir Andri & Partners or in the subsequent internal e-mails sent by Mr Chair to Ms Koh and Mr Mak Lin Kum (PW5), another partner in the firm who was tasked to prepare court filings in relation to the scheme of arrangement. There was no evidence that the defendant communicated with personnel from CIMB or anyone from the law firm during the time that he was away in London and Belgium.

**[102]** In my view, the fact that the defendant was away during this period – when work for documentation relating to the proposed privatisation commenced in earnest – did not in any way detract from the evidence regarding the defendant's prior interaction with Mr Ong and Mr Tan from CIMB before he left the country. In addition, Ms Koh had testified that:

(i) it was the defendant who had instructed her to undertake research on Selangor State Development Corporation Enactment 1964 (which showed that the defendant knew the identity of PKNS, consistent with the testimonies of Mr Ong and Mr Tan); and

(ii) she had discussed the first draft of the JVA with the defendant (which draft contained the names of the entities involved) and that he had also told her to remove the names of those entities from the draft.

**[103]** When assessed as a whole, the evidence showed that by 28 June 2006, lawyers at Kadir Andri & Partners (including the defendant) knew not only that it was PKNS that was undertaking the proposed privatisation, but also that the company that was to be taken private was Worldwide Holdings Berhad.

**[104]** The shares in Worldwide Holdings Berhad were acquired by the defendant between 7 June 2006 and 11 July 2006. I found that the Commission had proven, on a balance of probabilities that, at the time the defendant acquired these shares, he possessed information that a privatisation exercise was being proposed to PKNS by CIMB and that the company to be taken private was its listed subsidiary, Worldwide Holdings Berhad.

**[105]** For his part, the defendant denied having been told the identity of PKNS or Worldwide Holdings Berhad by Mr Ong or Mr Tan of CIMB, and that he only became actively involved in the transaction around the middle of July 2006 when the documentation was nearly final. According to him, this was also when he knew the identity of Worldwide Holdings Berhad. His role at the outset was "to identify the optimal structure to achieve the objective of CIMB which was achieved in advising on the optimal legal route"[19]. He testified that, at all times during the initial stage of his involvement with Mr Ong and Mr Tan, all discussions were conducted on a no-names basis.

**[106]** It has to be appreciated that the transaction being contemplated was not a run-of-the-mill corporate transaction. It was a transaction of some complexity, as it involved not just a privatisation of a listed company, but also a funding arrangement through the RPS structure in the JV company that was to be jointly owned by PKNS and CIMB. For CIMB, it was not merely a transaction in which it acted as an advisor; it also took a proprietary interest in the privatisation[20]. It was for this reason that the client on record for Kadir Andri & Partners was CIMB, and not PKNS, as CIMB had a financial interest to safeguard. Mr Sreesanthan was chosen by CIMB because Mr Ong and Mr Tan saw him as their trusted advisor. In the defendant's own words, they trusted his judgment, and they trusted his capacity to advise them on the best possible structure to achieve their objectives[21].

**[107]** Given this background, I considered that it was improbable that the defendant's role would have been to only supply a light touch until the documentation was at a near final stage. The defendant, in my judgment, was understating the importance of the role he played in structuring the transaction at the initial stage. The very reason CIMB has sought him out specifically was to mine the considerable depths of his experience and skill as a legal structuring expert. Given the concerns that CIMB had had about the ability of shareholders in Worldwide Holdings Berhad who were connected to PKNS to vote in the shareholders' meeting to approve the privatisation, it was more likely than not that the identity of PKNS had been revealed to him by Mr Ong and Mr Tan even prior to the trades in the Worldwide shares. Furthermore, Ms Koh refuted the suggestion that the defendant's involvement was only when the documents were nearly final[22].

**[108]** Mr Ong and Mr Tan also testified that sometime after the proposed privatisation had been announced, CIMB discovered that the defendant's name was on the record of depositors as being one of the shareholders in Worldwide Holdings Berhad. This was a matter of some concern for CIMB, as CIMB considered that it would not have been appropriate for the legal advisor on the transaction to be listed as a shareholder when the matter went to vote at the general meeting to approve the privatisation. A meeting was arranged with the defendant. Mr Tan recollects the event in the following manner:

> It was a short meeting as you can appreciate, it was an uncomfortable situation. When we brought it up to the Defendant, the Defendant appeared surprised and he told us that it was shares that he must have bought a long time ago and had forgotten all about it. We then left it to the good judgment of the defendant as to what was the appropriate cause of action for himself to take.

**[109]** If Mr Tan was correctly recollecting the events of that meeting, then what he had been told by the defendant could not have been the truth, for Mr Sreesanthan had only commenced buying the shares on 7 June 2006, the same day on which Mr Tan, together with Mr Ong, had met the Selangor Menteri Besar.

**[110]** Here again Mr Sreesanthan's testimony departed materially from the witnesses called by the plaintiff. His version of events was that he had told Mr Ong (the defendant did not recall Mr Tan being present at this meeting) that he had bought the shares based on a CIMB Securities investment research report (which was published only in April 2006). He denied having told Mr Ong that he had bought the shares a long time ago.

**[111]** This puts into stark focus the issue of credibility that was before the court. On critical points of evidence, the defendant's version of events differed materially from three different witnesses that were called by the plaintiff. If the defendant was to be believed, the court would have had to discount or reject the testimonies of two very senior former bankers, as well as that of a former associate of the defendant in the law firm of which he was a partner. At the time of trial, Mr Tan Hong Kheng was the Chief Financial Officer of Taylor's Schools. Mr Ong Liang Heng had become an executive director of the Securities Commission. Ms Koh Poi San had gone on to become a vice president of Legal Compliance & Land Management in Malayan Cement Berhad. None of these three had anything to gain by providing testimonies that were anything other than the truth. I also observed that each of them readily conceded that they could not recollect unequivocally on certain points put to them in cross-examination, which I considered reasonable given the intervening years since the events in question. This would not have been the response of witnesses who wished to paint a version of events that departed from the truth.

**[112]** For these reasons, I favoured the testimonies of Mr Ong, Mr Tan and Ms Koh over that of the defendant, and found that this element of the trading prohibition – that the defendant had in his possession information that PKNS proposed to privatise Worldwide Holdings Berhad – had been made out.

*Was The Information Generally Available?*

**[113]** In order to establish contravention of the insider trading prohibitions, it has to be proven that the information in question was not generally available at the time the act complained of was committed. Section 89A of the Securities Industry Act 1983 explains when information comes to be regarded as generally available:

> **89A. Information generally available**
>
> (1) For the purposes of this Division, information is generally available if the information has been made known in a manner that would, or would tend to, bring it to the attention of reasonable persons who invest in securities of a kind whose price or value might be affected by the information, and since it was so made known, a reasonable period for it to be disseminated among, and assimilated by, such persons has elapsed.
>
> (2) The information referred to in subsection (1) includes information that consists of deductions or conclusions made or drawn from such information.

**[114]** A company listed on Bursa Malaysia is subject to continuous disclosure requirements, which places on the company the obligation to make an announcement regarding any material developments affecting its business. In the present instance, trading in the shares of Worldwide Holdings Berhad on Bursa Malaysia was suspended on 22 August 2006. The text of the announcement for the suspension read as follows:

> We wish to announce that Bursa Malaysia Securities Berhad ("Bursa Securities") has approved the Company's request for a suspension in the trading on the Main Board of Bursa Securities with effect from 9.00am on 22 August 2006 pending announcement of a proposal involving the securities of the Company which would result in the Company being taken private, which would warrant a material announcement.[23]

**[115]** On the following day (23 August 2006), the board of directors of Worldwide Holdings Berhad made a further announcement regarding the intention of PKNS to privatise it by way of a member's scheme of arrangement. A letter from PKNS to the board dated the same day was attached to the announcement.

**[116]** From the above, it can be seen that the fact of the proposed privatisation was announced on 22 August 2006, and the broad details regarding the manner in which the privatisation was to be effected (including the price at which the minority shares were to be bought out) was announced a day later. No trading could be effected in the shares of Worldwide Holdings Berhad until the suspension was lifted.

**[117]** Prior to the suspension of trading, the shares in Worldwide Holdings Berhad were traded with a closing price of RM2.54 per share on 21 August 2006. The price at which PKNS offered to buy out the minority shareholders in the company was RM3.50, as disclosed in the announcement of 23 August 2006. (The eventual price at which the buy-out was effected was RM3.90, although this is not material for the present purposes.) When trading in the shares of Worldwide Holdings Berhad resumed on 25 August 2006, the price traded opened at RM3.22[24], a jump of almost 27% from the closing price prior to suspension of trading.

**[118]** On 19 August 2006 – ie on a Saturday three days prior to the suspension of trading – the Star newspaper published an article entitled "Worldwide to be taken private?" in its business section. This article was written by the journalist Mr Jose Barrock (WSD1). In this article, Mr Barrock, quoting unnamed sources, stated:

> It is believed that the company's parent Perbadanan Kemajuan Negeri Selangor (PKNS), the economic arm of the Selangor Government and controlling as much as 52% in Worldwide, may be looking to take the company private *via* a general offer (GO). The offer price is yet to be ascertained but market sources say it could be in the region of RM2.80.

**[119]** At trial, Mr Barrock testified that he had spoken to his source at around May/June 2006. He also testified that the proposed privatisation was discussed among merchant bankers and remisiers with whom he dealt.

**[120]** Between the date on which the article was published and the suspension of trading on Tuesday, 22 August 2006, there was only one trading day: Monday 21 August 2006. At close of business on Friday, 18 August 2006, trading in the shares of Worldwide Holdings Berhad had closed at RM2.34. When the market opened on Monday, trading in the shares resumed at RM2.50, hitting an intra-day high of RM2.59 before closing at RM2.54. Trading volume also increased significantly. In fact, trading volume in the shares had increased almost by an order of magnitude even on 18 August 2006, suggesting that the market had gotten wind that there was going to be a material development regarding Worldwide Holdings Berhad.

**[121]** A number of observations may be made regarding the Star article by Mr Barrock and his testimony at trial:

(i) the publication of a proposed privatisation by PKNS in the Star article appeared to have caused a material and observable increase in the traded share price of Worldwide Holdings Berhad;

(ii) even though Mr Barrock had gotten the mode of privatisation wrong – he postulated that it was to be effected by a general offer – nonetheless, as explained at paras 130 *et seq., post*, the fact that a privatisation was being proposed by PKNS was itself material information;

(iii) he quoted market sources as stating that the offer price could be "in the region of RM2.80". A reasonable investor, upon reading the article, may have been prompted to buy the shares in Worldwide Holdings Berhad when market re-opened on Monday, but certainly would not pay more than RM2.80 per share. Indeed, a reasonable investor would have to account for transaction costs – this would explain why trading on Monday, 21 August 2006 only attained a high of RM2.59;

(iv) although Mr Barrock testified that he had received the information regarding the proposed privatisation in May or June of 2006 and that it had been discussed at around that time among merchant bankers and remisiers whom he dealt with, this did not make the information regarding the proposed privatisation "generally available" within the meaning of s. 89A. In order for the information to be generally available, it must have been made known in a manner that would or would tend to bring it to the attention of reasonable investors who would invest in shares, and a reasonable period must have elapsed for the information to be assimilated by such persons.

**[122]** In my judgment, even taken at its maximum, Mr Barrock's testimony was incapable of being taken to mean that the information regarding the proposed privatisation had become generally available in May or June of 2006. Remisiers are securities intermediaries – individuals who hold a securities representative's licence and who are attached to stockbroking companies. They act as brokers and are not within the class of persons whom the court would consider as "reasonable investors" in this context. Similarly, merchant bankers act as corporate finance advisors to listed companies. Even though a merchant bank or investment bank may engage in proprietary trading of securities (ie investing in equity securities as part of their day-to-day business), these institutions would have in place Chinese wall procedures that are intended to prevent the flow of material non-public information obtained from its corporate advisory businesses to other parts of the organisation, in particular those parts that perform proprietary trading activities.

**[123]** The facts narrated in the preceding paragraphs establish that the earliest the information that PKNS was proposing to undertake a privatisation of Worldwide Holdings Berhad became generally available was on 19 August 2006, when Mr Barrock's article was published in the Star. Further details regarding the proposed privatisation, such the price at which the minority shareholders were proposed to be bought out, only became generally available when the announcement was made, on 23 August 2006. There was no other evidence that showed that the information relating to the proposed privatisation had been generally available at any earlier date. Evidence that Mr Barrock had obtained in May or June 2006 the information

A that he had used in the Star article, or that the privatisation was being discussed among merchant bankers and remisiers in May or June 2006, was not capable of establishing that the information regarding the proposed privatisation had earlier become generally available, for the reasons explained above. For these reasons, I found that, at the time the defendant
B traded in the shares of Worldwide Holdings Berhad, information regarding the proposed privatisation was not yet generally available within the meaning of s. 89A.

**[124]** The finding of fact that the information was not generally available at the time the trades were effected and only became generally available after
C the Star article was published is corroborated by the increase in the share price of Worldwide Holdings Berhad as well as the increase in the trading volume of the shares. Between 1 September 2005 and 18 August 2006 – a period of almost one year – the share price of Worldwide Holdings Berhad traded between RM1.74 and RM2.40. On the trading day after the Star
D article, the price attained an intra-day high of RM2.59, and when trading resumed after the suspension, the highest price traded on 25 August 2006 was RM3.26. The fact that the price of the shares attained their highest levels for a year after publication of the Star article and the announcement was suggestive of the fact that the information contained in them was not
E previously generally available. In the case of *R v. Doff*[25], the Supreme Court of New South Wales stated:

> [19] There was evidence, which was held admissible in *R v. Hannes* (2000) 158 FLR 359; 36 ACSR 72; [2000] NSWCCA 503 and in *R v. Rivkin* (2004) 59 NSWLR 284; 184 FLR 365; [2004] NSWCCA 7 at [187-201], to show
F that the price of Qantas shares rose sharply after this announcement, a circumstance consistent with the proposition that, notwithstanding rumours and speculation, information in relation to the deal had not previously been generally available and that it was price sensitive.

**[125]** The defence relied upon an investment research report published on 7 April 2006 by CIMB Securities Sdn Bhd to support the argument that
G information relating to the proposed privatisation had already entered into the public domain by this date. However, if this report is examined closely, all it stated was that the price of the shares of Worldwide Holdings Berhad was trading at a level that was well below the value that is implied by the worth of its assets. There is no mention in this report regarding any corporate
H proposal that was being contemplated either by PKNS or by Worldwide Holdings Berhad itself. For this reason, I was of the view that this investment research report (as well as the other reports and publications relied upon by the defendant) did not make the information regarding the proposed privatisation generally available.

I

**[126]** There is a second reason why an investment research report could not be relied upon by the defence: a recommendation made by a particular analyst to his or her clients, or a recommendation made in a newsletter issued by a financial services licensee, would typically have restricted circulation and therefore cannot amount to a public disclosure of information. Thus, if a research report contained material non-public information (as distinct from analysis of information from publicly available sources), the publication of that report to a selected group of clients would not cause the information in question to become generally available.

**[127]** Before leaving this particular discussion, I would like to address, for the sake of completeness, the question why Mr Barrock's article would not offend the tipping prohibition. Such an article would obviously have been written in anticipation that a reasonable reader might act on the information contained in it. If Mr Barrock's source of information was an "insider" within the meaning of s. 89E(1), the question may be asked as to why Mr Barrock's article is not objectionable. The reason is that any publication of material non-public information that would cause the information to become generally available is specifically exempt as a defence to the tipping prohibition: see s. 89O(2)(a) of the Securities Industry Act 1983.

*Did The Defendant Know That The Information Was Not Generally Available?*

**[128]** In order to establish a contravention of s. 89E(2), the Commission must not only prove that the information in question was not generally available but also that the defendant knew or ought reasonably to have known that the information was not generally available: see s. 89E(1)(b).

**[129]** I found that this element of the trading prohibition was satisfied for the following reasons:

(i) any reasonable person in the position of the defendant as a vastly experienced corporate lawyer ought to have known that information communicated to him in contemplation of a corporate proposal that had not yet been announced would be information that was not generally available. In the circumstances of this case, I found it inconceivable that the defendant did not know that the information about the proposed privatisation was not generally available at the time that the trades in question were effected. Indeed, in his own witness statement, he acknowledges that information that were the subject of discussions with investment bankers regarding corporate proposals would be "commercially sensitive" information[26];

(ii) secondly, the engagement was assigned the code name "Project State". It would be legitimate to infer that, if a person knew that a code name has been assigned to an engagement involving a publicly listed entity,

A then the information relating to that engagement would not only be confidential and commercially sensitive, but would also be information that is not yet publicly announced;

(iii) thirdly and no less significantly was the testimony of Ms Koh Poi San, the defendant's associate at the material time. Ms Koh testified that she
B had been directed by the defendant to remove the names of the parties from the draft JVA that she had prepared, from which the court may infer that the defendant was cognisant of the need to maintain the confidentiality of the information obtained by Kadir Andri & Partners in relation to the engagement and of the need to reduce the likelihood
C of material information being inadvertently released to non-authorised persons prior to a public announcement. Ms Koh came across as a reliable witness and I saw no reason to disbelieve her testimony, as she had no particular motive to be untruthful in her answers.

*The Materiality Of The Information*

D

**[130]** The final element of the trading prohibition is the materiality of the information that was in the possession of the defendant. If the information were generally available, would a reasonable person expect it to have a material effect on the price or value of shares in Worldwide Holdings
E Berhad?

**[131]** As explained earlier, this is an objective test, the answer to which is unaffected by the defendant's state of knowledge or belief regarding the materiality or otherwise of the information in his possession. In this regard, the Malaysian provision differs from its Australian counterpart. Whether or
F not the information in any particular case is material is a question of fact, to be determined from the circumstances of each case.

**[132]** Section 89B of the Securities Industry Act 1983 further provides as follows:

G **89B Material effect on price or value of securities**

For the purposes of this Division, an information that on becoming generally available would or would tend to have a material effect on the price or value of securities, refers to such information which would or would tend to, on becoming generally available, influence reasonable persons who invest in securities in deciding whether or not to acquire or
H dispose of such securities, or enter into an agreement with a view to acquire or dispose of such securities.

**[133]** The sum effect of s. 89B read together with s. 89E(1)(a) was this: the court has to determine the effect that the information would have on investor decision-making.

I

**[134]** At trial, both parties called experts to provide opinion evidence on the issue of materiality, although the terms of reference of the experts differed somewhat. The testimonies from the experts were received simultaneously at the end of trial, after the witnesses of fact had testified, in what is commonly referred to as a hot-tubbing exercise.

**[135]** In my view, the information relating to the proposed privatisation by PKNS was material information within the meaning of s. 89E(1)(a) for the following reasons:

(i) firstly, the fact that there was a sharp increase in the share price following the publication of the Star article and the announcement on 23 August 2006 was evidence that the information regarding the privatisation was material;

(ii) secondly, it would have been in the reasonable contemplation of a reasonable investor that, if PKNS was proposing to undertake a privatisation, it would have to offer, or cause to be offered, a price to the other shareholders in Worldwide Holdings Berhad that would be at a significant premium over the market price at the time, in order for there to be sufficient incentive for them to vote in favour of the privatisation. Accordingly, the fact that PKNS was contemplating a privatisation of Worldwide Holdings Berhad was, without more, information that a reasonable person would expect to have a material effect on the price of Worldwide shares. It was not necessary for the Commission to prove that the defendant knew, at the time he traded in the Worldwide shares, which route the privatisation was to take, or what the offer price of the shares was to be;

(iii) for the reasons explained at paras. 156 to 172 *post,* I preferred the testimony that the plaintiff's expert gave at trial over the evidence of the defendant's expert.

**[136]** These conclusions are explained in the following paragraphs.

**[137]** It has been established in Australian cases such as *R v. Doff*[27] and *R v. Rivkin*[28] that evidence relating to the movement in price of the relevant securities after an announcement of the information that was in the possession of a defendant or after the publication of such information was relevant and admissible for the purposes of determining the materiality of that information. (See the passage quoted at para. 124 above.) This is the case even though the materiality of the information in question is to be ascertained at the time of the trades that are complained of. Put another way, the effect that the subsequent publication of the information had on the share price could be used to determine whether or not the information was material at the time the defendant traded in the shares.

**[138]** This, in my judgment, stands to reason and common sense, for if the information had been disclosed to the public and had been assimilated by reasonable investors prior to the announcement of that information, then one can reasonably expect that the announcement would not have any effect on the share price. The fact that there was a sharp increase in the share price following the publication of the Star article and the announcement on 23 August 2006 supported the plaintiff's contention that the information regarding the privatisation was material.

**[139]** It was advanced on behalf of the defendant that there were other price spikes for shares in Worldwide Holdings Berhad for the periods 7-13 April 2006, 8 and 9 May 2006 and 22 June 2006, which – argued Mr Sreenevasan – showed that the information on the proposed privatisation was already generally available by the time the defendant traded in the shares. It was contended that there were market rumours regarding the proposed privatisation at these times. Following this argument, the information relating to the proposed privatisation could not then be considered material at the time of the trades.

**[140]** The first answer to this submission was that the defendant had started trading in the shares of Worldwide Holdings Berhad on 7 June 2006. (The defendant had purchased 200,000 shares between 7 and 13 June 2006.) Thus the price spike on 22 June 2006 cannot be taken into account for the purposes of determining the materiality of the information relating to the proposed privatisation for the trades that were effected before 22 June 2006.

**[141]** In addition and perhaps more importantly, if indeed the information relating the proposed privatisation was already publicly available and no longer material prior to the trades by the defendant, then why were there further spikes in the share price both after the publication of the Star article and the announcement? The only logical and plausible answer was that the information contained in the Star article and the announcement was information that had influenced reasonable investors to purchase Worldwide shares.

**[142]** Much was made in the submissions of counsel for both the plaintiff and the defendant regarding the specific information that the defendant had in his possession at the time the trades were effected. It was advanced for the defendant that, at the material time, the defendant did not know how the privatisation was to be effected. It will be recalled that the defendant first traded in Worldwide shares on 7 June 2006, on the same date that representatives from CIMB met with the Menteri Besar. Prior to the meeting with the Menteri Besar, two alternative mechanisms were being contemplated: a scheme of arrangement and a selective capital reduction. It was also pointed by Mr Sreenevasan that the Commission had not established

at what point the defendant knew of the price that was to be offered by PKNS to the minority shareholders. I can fairly say that there was no dispute that the offer price would have been material information in this context.

**[143]** In my judgment, the fact that a majority shareholder was contemplating a privatisation of its listed subsidiary, without more, was already material information. Regardless of the mode by which the privatisation was to be effected, information that a privatisation was in contemplation was information that would influence reasonable investors in their investment decisions.

**[144]** In order to explain this finding, it will be necessary to examine the dynamics of a shareholder's investment decision-making where a privatisation is being proposed.

**[145]** A privatisation can be undertaken in any number of ways. Amongst them are:

(i) a general offer for the shares, which is regulated under the Malaysian Code on Take-overs and Mergers. Under this option, the offeror makes an offer to the other shareholders in the company to purchase their shares. If the offeror obtains 90% or more acceptances, it may then proceed to compulsorily acquire the shares of the remaining shareholders, notwithstanding that they may have decided not to accept the general offer. One disadvantage of this route for privatisation is that the offeror can only proceed to acquire all the shares in the company if it obtains 90% acceptances from the holders of the shares not already owned by the offeror. Hence, if the offeror already holds, say 50% in the company, it must obtain acceptances from holders of another 45% (being 90% of the remaining 50%);

(ii) a scheme of arrangement under s. 176 of the Companies Act 1965 (now s. 366 of the 2016 Act). Under this route, the scheme will need to be approved by a majority in number representing not less than three-fourths in value of the members before it may be carried out. The majority shareholder that is carrying out the privatisation, and persons connected to it, will not be permitted to vote on the scheme. It can be seen that the threshold for shareholder approval under a scheme of arrangement could potentially be lower than the threshold needed to be obtained in order to effect a privatisation *via* a general offer;

(iii) a selective capital reduction, by which capital in the company is returned to all shareholders except the shareholder that is undertaking the privatisation exercise. The capital reduction must be approved by the company in general meeting by way of a special resolution. Once the capital is returned to all other shareholders, their shares are cancelled,

A leaving the "promoter" of the privatisation as the sole shareholder. One important distinction between this mode and the others is that the privatisation is funded in a selective capital reduction out of the assets of the company, whereas in the others it will be funded by the shareholder that is proposing the privatisation.

B **[146]** There is a myriad of other considerations such as tax, accounting treatment and whether there are distributable reserves that will drive the determination of which option would be the most attractive to the shareholder that is undertaking the privatisation exercise, all of which are not germane for consideration in the present case.

C **[147]** The most important point is this: regardless of which route is taken, if it wants the privatisation to succeed, the shareholder that is undertaking the privatisation exercise must offer a price that is attractive enough to the other shareholders in the company in order for them to either accept the general offer, or to vote in favour of the proposed privatisation at the general D meeting or meeting convened for the scheme of arrangement. In the case of a selective capital reduction, the shares held by the other shareholders are not bought out by the remaining shareholder *per se*, since capital is returned in respect of each share, as a result of which the share is cancelled. However, regardless of the true legal characterisation of the transaction, the commercial E reality is that the capital to be returned to each shareholder or the offer price (as the case may be) must be sufficient to make it attractive for them to vote in favour of the privatisation exercise.

**[148]** To this end and by dint of logic and common sense, the price offered or capital to be returned must exceed the current market price for the shares F in question, for otherwise the shareholder would simply hang on to his or her shares (perhaps in the hope that the share price might increase in the future). Indeed, the price offered must also exceed the sum of the current share price together with the present value of any expected future distributions. Otherwise, it would not make sense to the rational shareholder G to accept the general offer or to vote in favour of the proposed privatisation.

**[149]** In the present instance, the price initially offered to the other shareholders by PKNS was RM3.50, which was significantly above the market price for the shares at the time. It will be recalled that the share price closed at RM2.54 immediately prior to the announcement. The following H table sets out the premium offered over the volume-weighted average market price of Worldwide shares[29]:

| | | *Premium over VWAP* |
|---|---|---|
| I 5-day VWAP | RM2.39 | RM1.11 (46.4%) |
| 3-month VWAP | RM2.17 | RM1.33 (61.3%) |
| One year VWAP | RM2.08 | RM1.42 (68.3%) |

**[150]** As pointed out earlier, the eventual offer price was RM3.90.

**[151]** In my judgment, it would have been in the reasonable contemplation of a reasonable investor that, if PKNS was proposing to undertake a privatisation, it would have to offer, or cause to be offered, a price to the other shareholders that would be at a significant premium over the market price at the time, in order for there to be sufficient encouragement for the shareholder to vote in favour of the privatisation or to accept a general offer. This would be the case regardless of the mode by which the privatisation was to be effected.

**[152]** The investment research report by CIMB Securities Sdn Bhd estimated that the realisable net asset value (RNAV) per share of Worldwide Holdings Berhad was RM6.09, or more than three times its market price at the time of the report. Even if the value of its net tangible assets were to be taken using the figures stated in the accounts, the value implied by its net tangible asset was RM4.23 per share. This meant that PKNS had significant upside to gain from a privatisation exercise, which in turn meant that it would have been willing to pay a significant premium over the market price at the time.

**[153]** For these reasons, I was of the view that the fact that PKNS was contemplating a privatisation of Worldwide Holdings Berhad was, without more, information that a reasonable person would expect to have a material effect on the price of Worldwide shares. It was not necessary for the Commission to prove that the defendant knew, at the time he traded in the Worldwide shares, which route the privatisation was to take, or what the offer price of the shares was to be.

**[154]** As explained at para. 123 *ante*, the fact that PKNS was proposing a privatisation of Worldwide Holdings Berhad became publicly available only when Mr Jose Barrock's article entitled "Worldwide to be taken private?" was published in the Star on 19 August 2006. The fact that the privatisation was to be undertaken by way of a scheme of arrangement and that the initial offer price was RM3.50 became publicly available on 23 August 2006, when the announcement was made by the Worldwide Holdings Berhad.

**[155]** The preceding paragraphs should not be taken to mean that the proposed offer price or the mode of privatisation was not material information; on the contrary, I am of the view that the offer price would also have been information that a reasonable person would expect to have a material effect on the price of Worldwide shares. The point to be appreciated here was that it was sufficient for the Commission to have shown that the defendant knew that there was a privatisation being contemplated by PKNS of listed subsidiary at the time that he traded in the Worldwide shares.

**[156]** Both the plaintiff and the defendant engaged experts to provide opinion evidence regarding the issue of materiality. However, each of them had proceeded on a very different basis.

**[157]** The plaintiff's expert was Mr David Meow, whose many qualifications included chartered financial analyst, financial risk manager, chartered management accountant and chartered accountant. He also founded a company that provides training services in areas related to the financial markets and also provides consultancy services in securities valuation.

**[158]** Mr Meow's terms of reference required him to address two issues:

(i) to provide an opinion whether the information contained in the announcement by Worldwide Holdings Berhad on 23 August 2006 would or would tend to influence a reasonable investor who invests in securities on Bursa Malaysia in deciding whether or not to buy or sell Worldwide shares; and

(ii) to provide any other analysis considered useful in the relation to the price and volume of Worldwide shares between 1 June to 31 September 2006.

**[159]** Mr Meow concluded that the information contained in the 23 August 2006 announcement was material. He analysed the differences in the information in the announcement between that contained in the Star article by Mr Jose Barrock dated 19 August 2006, and concluded the prior publication of Mr Barrock's article did not render the announcement redundant, because (among others) there was a price differential of 70 sen per share between Mr Barrock's postulated offer price and the price that was offered by PKNS as disclosed in the announcement.

**[160]** In my respectful judgment, the Mr Meow's opinion in this regard was of limited utility to the court, as the object of the exercise was not to evaluate the materiality of the information that was contained in the announcement, but rather to evaluate the materiality of the information that the defendant had in his possession.

**[161]** The latter was the task before the court, as can be seen from clear words of s. 89E(1)(a). The distinction is crucial, because the announcement contained details that may or may not have been within the knowledge of the defendant at the time he traded in the Worldwide shares. For instance, it was never established when the defendant knew of the offer price of RM3.50, or indeed whether he knew it at all at any time prior to the announcement.

**[162]** To his credit, Mr Meow did undertake a "reduced form analysis" of the information contained in the announcement. He explained the reduced form approach in the following manner:

**3.2.2 Reduced Form**

> As in most insider trading cases, the insider who learns from another may not possess the exact form as per the underlying public announcement but rather, in a reduced form. Thus, this report would need to conclude on materiality based on a reduced form approach.
>
> The reduced form approach would allow the opinion of this report to remain valid for any person possessing pieces of information which is subject to the Announcement provided that the source remains reliable.

**[163]** However, in the reduced form analysis at para. 5.1.2 of his report, Mr Meow compared the "main narrative" of the announcement to the contents of the Star article. It has to be remembered that, at the time the defendant traded in the shares, Mr Barrock's article in the Star had not been published yet, and so the comparison between the contents of the announcement and the contents of the Star article was not relevant for the purposes of determining the materiality of the information that was in the possession of the defendant at the time he had traded in the Worldwide shares. In my view, the proper inquiry would have been to ask whether the information that Worldwide Holdings Berhad was to be taken private would have been information that a reasonable investor would expect to have a material effect on the price or value of Worldwide shares. The reduced form information here was the fact of the proposed privatisation by PKNS, without more.

**[164]** At trial, the point on the materiality of the reduced form information regarding the proposed privatisation was eventually made by Mr Meow[30]. In Mr Meow's opinion, if a reasonable investor found out about the privatisation, that investor could reasonably expect the offer price for the privatisation to be more than the current trading price, and that being the case, there would be room for the investor to accrue a profit from the purchase of Worldwide shares.

**[165]** The defendant called as his expert Professor Talis J Putnins, a professor of finance at the University of Technology Sydney. Professor Putnins was a specialist in market microstructure, market manipulation, insider trading and asset pricing.

**[166]** The terms of reference for Professor Putnins were set out in the following two questions:

> Question 1: What would the effect of the analyst report dated 7 April 2006 be on the investor, the market and the market price of the shares in Worldwide Holdings Berhad ("Worldwide")?
>
> Question 2: What are your views with regard to Mr Meow's expert opinion report (hereafter the "Meow Report")?

**[167]** In my respectful view, the first question posed was misconceived, because it did not address the crux of the inquiry. The question for determination was the materiality of the information that was in the possession of the defendant. I have found that the defendant, at the time he traded in Worldwide shares, had known that PKNS was proposing to privatise its listed subsidiary and that he had deduced that this subsidiary was Worldwide Holdings Berhad. There was also direct evidence that, he must have known of the identity of Worldwide Holdings Berhad no later than 29 or 30 June 2006, which was around the time the second tranche of shares had begun to be acquired. The critical piece of information that was in his possession was thus the proposal by PKNS for privatisation. The investment research report by CIMB Securities dated 7 April 2006 contained no information regarding any privatisation. Nor did it contain any suggestion, veiled or otherwise, regarding any such exercise. Therefore, to assess the materiality of the information contained in the CIMB Securities investment research report would be of no assistance whatsoever to the issue that was before the court.

**[168]** Professor Putnins answers this criticism in section 4 of his rebuttal report. He summarises the rebuttal in following terms:

> 37. The CIMB Analyst Report is therefore relevant because it provides an indication of what a Reasonable Investor might believe about the fundamental value and thus the range within which a Reasonable Investor would expect the price of Worldwide's shares to be trading at the expected time of the announcement. By failing to take these expectations of fundamental value and future price into consideration, the Meow Report has not adequately addressed the materiality of the information about the proposed privatisation.

**[169]** In other words, Professor Putnins argues that the reasonable investor, having read the CIMB Securities investment research report would have made a determination of the fundamental value and future price of the shares in Worldwide Holdings Berhad, and hence any information regarding any privatisation would not have had any additional effect on the reasonable investor's decision whether or not to buy Worldwide shares.

**[170]** There are two flaws in this reasoning: firstly, if Professor Putnins is correct, then the announcement on 23 August 2006 ought not have had any effect on the price of Worldwide shares. That was patently not the case, because after the trading suspension was lifted, Worldwide shares resumed trading at RM3.22, which was a 27% jump from the closing price prior to the suspension. The empirical evidence was at odds with Professor Putnin's opinion.

**[171]** Secondly, he assumed that the reasonable investor makes an investment decision purely on the basis of fundamental value. This may not be the case in all circumstances, and was certainly not the case for Worldwide Holdings Berhad. The question to be asked is why was Worldwide Holdings Berhad trading below its fundamental value in the first place? The answer is found in the testimony of Mr Ong Liang Heng (PW2), who was the person who first conceptualised the idea of the privatisation. In cross-examination, Mr Ong explained that one of the key reasons that the shares in Worldwide Holdings Berhad was trading below its fundamental value was the lack of confidence that investors had in its management[31]. While it is true that a reasonable investor would have taken into account fundamental value in assessing Worldwide Holdings Berhad as an investment, the reasonable investor would have also taken into account the challenges that it faced in its management. It was for this reason that the shares were undervalued when compared to the fundamentals of Worldwide Holdings Berhad. Indeed, the price continued to be undervalued when compared to fundamentals even after the announcement was made. This undervaluation was precisely why the privatisation made sense for PKNS.

**[172]** Having considered carefully the respective reports prepared by the experts and their testimony at trial, I was inclined to prefer the answer that Mr Meow had given at trial over the opinion of Professor Putnins. It was alleged that the defendant knew about the proposed privatisation, and also knew that this information was not generally available. If this information became generally available, would it influence reasonable persons who invest in securities listed on Bursa Malaysia to buy or sell the Worldwide shares? As explained above, I was of the view that the answer was in the affirmative.

**Other Arguments Raised By The Defence**

**[173]** In the following paragraphs, I address the arguments raised by the defence, to the extent that they have not been covered in the preceding paragraphs.

*Mens Rea And Intent To Use Inside Information*

**[174]** It will be recalled that Mr Sreenevasan argued that, in order to establish contravention of the trading prohibition, the Securities Commission must prove the defendant's intention to trade on the basis of inside information. It was advanced for the defendant that he had not traded on the basis of any information that he may have received from CIMB regarding the proposed privatisation, but had instead acquired the Worldwide shares:

(i) on the basis of the investment research report published by CIMB Securities Sdn Bhd on 7 April 2006, which the defendant obtained from his remisier, Ravindran Ponnusamy (DW2); and

(ii) because the Worldwide Holdings Berhad had announced a final dividend of 10 sen per share for shares acquired before the ex-dividend date of 12 July 2006.

**[175]** It was argued that, because Mr Sreesanthan had bought the shares for these discrete reasons (and not on the basis of information relating to the proposed privatisation), no liability attached to him for the trades.

**[176]** However, as I have explained at paras. 21 to 69 *ante*, it is not necessary for the Commission to prove intention to use the inside information. Intent to use does not form part of any element of the trading prohibition. The trading prohibition takes effect once a person comes into possession of material non-public information and knows or ought to know that the information is not generally available. If he trades in shares to which that material non-public information relates, he contravenes the trading prohibition.

**[177]** In this case, I have made the finding of fact that the defendant was in possession of material non-public information before the first trade in the Worldwide shares was effected, on 7 June 2006. He also knew or ought to have known that the information was not generally available. He was therefore liable under s. 89E(2).

*Irrevocable Instructions To The Remisier*

**[178]** At para. 8.2 of the defence, the defendant contended that he had given irrevocable instructions to the remisier Ravindran to acquire a fixed number of Worldwide shares prior to the ex-dividend date. This was so that the defendant could become entitled to the dividends that had been declared.

**[179]** At trial, although Mr Ravindran could not remember exactly when the defendant had instructed him to buy the Worldwide shares, he accepted the suggestion from Mr Shanmugam for the plaintiff that he could have received the instructions around a week prior to the first trade on 7 June 2006[32].

**[180]** This meant that, at the time Mr Sreesanthan instructed Mr Ravindran to purchase the first tranche of 200,000 shares, Mr Sreesanthan was already in possession of material non-public information that he knew or ought to have known was not generally available. Accordingly, the fact that he may have given irrevocable instructions was of no particular consequence and did not affect the incidence of liability. In any event, the defendant did not seek argue that he had given the irrevocable instructions to Mr Ravindran before the first meeting with the CIMB personnel on 5 May 2006.

*Adverse Inference*

**[181]** Mr Sreenevasan urged the court to apply s. 114(g) of the Evidence Act 1950 to draw an adverse inference against the Commission for its failure to adduce documents and other evidence that it was empowered to inspect, to take copies of or to seize.

**[182]** I reproduce Mr Sreenevasan's argument *verbatim* below, for fear that I would not do him justice by paraphrasing it:

89. We wish to make the observation SC could have but did not obtain the following information to aid in this matter, including:

    89.1 Interviewing in obtaining information from Jose Barrock about the proposed privatisation being in the offing for some time since May/June 2006. SC did not do so despite being aware of Jose Barrock's article in the Star.

    89.2 All electronic communications from KAAP and CIMB, including but not limited to any marked-up drafts of the JVAs from Poi San's computer that was supposed to have recorded Sreesanthan's input or feedback on the draft JVAs as well as the information to prove what and when Sreesanthan read the emails.

    89.3 Hard copies of drafts of the JVA that purportedly recorded Sreesanthan's handwritten comments on the said draft JVAs, which must have been part of the documents obtained from KAAP.

    89.4 Computers and equipment from CIMB and KAAP for forensic imaging to analyse the activity that have occurred on the computers.

90. It is apparent if one examines the Common Bundle of Documents, all the documents in relation to KAAP came from SC for the purposes of this trial. It is also apparent that there are vast holes on the documents which ought to be produced by SC but were not.

91. If these classes of information and/or documents were obtained by SC, the Court would be able to ascertain and review all internal communications between KAAP and CIMB as well as to determine when, if at all, Sreesanthan read such emails. Yet, despite SC's extensive investigation powers at its disposal, such documents were not included in the trial bundles of documents.

92. SC could have, but did not, produce all relevant evidence pursuant to its wide-ranging investigative powers. One can only surmise that if such evidence was produced it would have been unfavourable to SC's case against Sreesanthan.

93. In these circumstances we invite Yang Arif to draw an adverse inference against SC.

**[183]** It is not in dispute that the Commission has wide-ranging investigative powers at its disposal for the purposes of enforcing and monitoring compliance with securities laws. However, I am not persuaded that, just because those powers exist, the Commission comes under an obligation, in

proceedings commenced by it, to adduce all and any documents or other material that it had obtained in the course of investigations or that it could have obtained had it fully exercised those powers.

**[184]** It has to be remembered that an adverse inference ought not be drawn under s. 114(g) unless the circumstances justify it. In *Munusamy Vengadasalam v. PP*[33], Mohamed Azmi FJ delivered the following salutary reminder:

> It is essential to appreciate the scope of s. 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

**[185]** In the context of the present case, there was no contention from the defence that there was a critical piece of evidence that was being withheld or suppressed by the plaintiff. The argument raised was simply that, given the vast powers and resources that the Commission had at its disposal, it ought to have adduced more documents than those it did at trial, in the off chance that there may be something contained in the document that was exculpatory of the defendant.

**[186]** This did not satisfy the test in *Munusamy v. PP*, and I was thus of the considered view that this was not an appropriate case for the exercise of the discretion to draw an adverse inference under s. 114(g).

**[187]** Two further observations may be made:

(i) firstly, in the context of civil cases, parties are able to avail themselves of the discovery process in order to obtain information or material that may be relevant to their case. Where a party has had the opportunity to apply for discovery in order to obtain relevant documents but had failed to do so, I cannot see how that party can reasonably maintain an argument subsequently that there has been suppression or withholding of that document.

In this case, in the course of case-management conferences, the solicitors for the defendant had informed the court that they proposed to make an application for further and better particulars. The court suggested that this application be made only after the plaintiff's solicitors delivered the documents that they proposed to rely upon at trial and after the solicitors for the defendant has had a chance to review those documents. On 8 February 2019, the defendant made an application to be furnished with further and better particulars, and also filed a notice for leave to serve interrogatories on the plaintiff. On 19 March 2019, these applications were withdrawn. No other application for discovery was made.

In my view, the defendant had every opportunity to seek discovery of any other document in the plaintiff's possession that had not been furnished in the trial bundles which he considered could have bolstered his defence or adversely affected the plaintiff's case. He did not do so. Furthermore, after having examined the trial bundles, the applications for further and better particulars and interrogatories were withdrawn. In such a situation and in the absence of exceptional circumstances – such as, for example, an unanticipated material development arising from the testimony of a witness under cross-examination at trial – I am of the view that it would not be tenable for the defendant to successfully argue that an adverse inference ought to be drawn against the plaintiff for its alleged failure to produce unspecified documents;

(ii) secondly, if Mr Sreenevasan's argument is taken to its logical conclusion, it will mean that all trial courts will be inundated beneath a mound of documents, for a party will be placed under an obligation to produce all documents that might conceivably have a link to the dispute at hand, no matter how tenuous that link may be, for fear that an adverse inference will be drawn against it should it fail to do so. That cannot be the correct result if the efficacious and cost-effective administration of justice is a stated aim of the judicial process. The evidence that a party should produce ought to be that which it considers material and sufficient to prove its case.

*The Constitutionality Of Section 90*

**[188]** The present proceedings were commenced by the Securities Commission in exercise of its powers under s. 90 of the Securities Industry Act 1983, which empowers the Commission to seek civil remedies against a person alleged to have contravened insider trading laws. In the pleaded defence, the defendant contended that:

(i) the proceedings had been improperly commenced by the Securities Commission against the defendant, because only the Attorney General may bring any action for any offence alleged to have been committed, in accordance with art. 145(3) of the Federal Constitution; and

(ii) section 90 of the Securities Industry Act 1983 was unconstitutional to the extent that it purported to empower the Securities Commission to bring proceedings against any person for contravention of the insider trading laws, when the power to prosecute lay within the prerogative of the Attorney General, in accordance with the terms of the Federal Constitution.

**[189]** Article 145(3) of the Federal Constitution provides as follows:

> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

**[190]** It is tolerably clear that the expression "offence" as used in art. 145(3) means a crime or breach of law giving rise to criminal penalties, and that as a consequence "proceedings for an offence" refers to criminal proceedings. Are proceedings commenced pursuant to s. 90 of the Securities Industry Act 1983 criminal in nature?

**[191]** In my view, based on a proper construction of the Securities Industry Act 1983, they are not.

**[192]** The penalty provision for insider trading offences was contained in s. 89E(4), which provided as follows:

> (4) A person who contravenes or fails to comply with sub-section (2) or (3) commits an offence and is liable on conviction to a fine of not less than one million ringgit and to imprisonment for a term not exceeding ten years.

**[193]** The juxtaposition of the words offence and conviction in s. 89E(4) makes it doubly clear that any contravention of the insider trading prohibitions is a crime.

**[194]** However, contravention of the insider trading prohibitions also gives rise a statutory cause of action in favour of the Securities Commission. This cause of action is civil in nature. This was provided in s. 90(1):

> **90. Civil remedies**
>
> (1) Where it appears to the Commission that any person has contravened section 84, 85, 86, 87, 87A, 88 or 89E, the Commission may institute civil proceedings in the Court against that person, whether or not that person has been charged with an offence in respect of the contravention, or whether or not a contravention has been proved in a prosecution.

**[195]** Here again, the plain words used in s. 90(1) make it clear that any civil proceedings for contravention of, say, s. 89E is distinct from a prosecution of a contravention of that same section as an offence.

**[196]** That it was the intention of Parliament to create a civil cause of action is also evident from the proceedings in Hansard of 17 December 1997, when the Bill introducing s. 90 was read in Parliament:

> Sementara itu tindakan sivil hendaklah diperkenalkan dalam soal ini kerana darjah pembuktian adalah dihadkan kepada imbangan kebarangkalian sahaja, tidak seperti tindakan jenayah yang mempunyai darjah pembuktian yang tinggi iaitu melebihi keraguan yang munasabah atau beyond reasonable doubt. Selain daripada pembendungan kesalahan ini, melalui tindakan sivil salah satu dari objektif dalam memperkenalkan tindakan sivil ini ialah lebih ramai lagi yang akan mempunyai kepentingan untuk mengambil tindakan undang-undang atas kesalahan berkenaan dan tidak terhad kepada pendakwa raya sahaja. Tambahan pula dasar tindakan sivil membolehkan tuntutan ganti rugi yang penuh atau pampasan dibuat. Jadi, risiko kesalahan perdagangan dalaman bertambah dari setiap sudut.

**[197]** The institution of civil proceedings do not require the consent of the Attorney General.

**[198]** For these reasons, I did not consider that the present proceedings amounted to "proceedings for an offence" (as contended in para. 4.1 of the defence). Nor was it improperly instituted on the basis that the consent of the Attorney General was not obtained.

**[199]** As a corollary of the analysis above, s. 90 of the Securities Industry Act 1983 is not inconsistent with art. 145(3) of the Federal Constitution and therefore does not contravene art. 4.

**Reliefs And Orders**

**[200]** For the reasons explained in these grounds:

(i) I granted the declaration prayed for by the plaintiff at para. 5.1(a) of the statement of claim, to the effect that the defendant has breached s. 89E(2)(a) of the Securities Industry Act 1983;

(ii) I ordered that the defendant pay the sum of RM1,989,402 to the plaintiff, in accordance with s. 90A(5)(a) of the Securities Industry Act 1983.

Under s. 90A(5)(a), the Commission is empowered to recover from the defendant an amount equal to three times the difference between:

(i) the price at which the defendant acquired the Worldwide shares; and

(ii) the price at which those shares would likely to have been acquired had the information relating to the proposed privatisation been generally available.

In this case, the closing price for the Worldwide shares on the trading day immediately following the suspension of trading was RM3.20. It was advanced for the plaintiff that this was the price that the shares would have been on the days on which the defendant acquired the Worldwide shares, had the information relating to the proposed privatisation been generally available on the days that the trades in the Worldwide shares were effected in the defendant's account. I saw no reason to disagree.

The amount in question was derived in the following manner:

$3 \times [(\text{RM}3.20 \times 600{,}000 \text{ shares}) - \text{RM}1{,}256{,}865.98] = \text{RM}1{,}989{,}402$

with RM1,256,865.98 being with cost of acquisition of the shares

(iii) the defendant was ordered to pay to the Commission a civil penalty of RM1,000,000, in accordance with s. 90A(5)(b) of the Securities Industry Act 1983.

A One million ringgit is the maximum civil penalty payable under s. 90A(5)(b). I was of the view that the maximum penalty was justified for the following reasons:

(a) the defendant, as an advocate and solicitor of the High Court of Malaya, was expected to uphold the highest standards of integrity and honesty. As a seasoned corporate lawyer, and by some accounts the leading corporate lawyer of his generation, the defendant ought to have known better than to betray the duty of confidence that was emplaced upon him by the financial advisors of the privatisation exercise; and

(b) it was necessary, in the interest of justice and in order to preserve and maintain confidence in the fairness and integrity of the securities markets, for financial services professionals (like the defendant) be held to the highest standards of good conduct. The defendant in this case not just an advocate and solicitor but also a professional who provided legal services to the financial sector;

(iv) I granted an order barring the defendant from becoming a director of any public listed company for a period of ten years, in accordance with and pursuant to s. 100(1)(kk) of the Securities Industry Act 1983. The reason why I considered ten years was an appropriate period are the same reasons explained at sub-paras. (iii)(a) and (iii)(b), *ante*;

(v) the defendant was ordered to pay post-judgment interest of 5% per annum on the sums referred to in paras. (ii) and (iii) *ante* beginning 5 November 2020 until full satisfaction; and

(vi) the defendant was ordered to pay costs of RM100,000 to the plaintiff, such costs to be subject to an allocatur.

**Endnotes:**

1. The provisions were introduced by the Securities Industry (Amendment) Act 1998, which however came into force only in 2000.
2. By way of amendments introduced in the Corporations Legislation Amendment Act 1991.
3. [1999] VSC 488.
4. In this case, the charges were dismissed because leave to amend the charges was refused.
5. 38 ACSR 223.
6. *R v. Firns*, *op. cit.*, at para. 30.
7. [1999] SGHC 204.
8. [2012] SGCA 12.

9. [2012] SGCA 12 at para. 52.
10. [1985] AC 1.
11. [1969] 2 AC 256.
12. *Securities and Financial Services Law*, 9th edn by Robert Baxt, Ashley Black and Pamela Hanrahan.
13. [2015] WASC 251.
14. See NOE/106.
15. See NOE/36.
16. (1986) 10 ACLR 462.
17. NOE/283.
18. NOE/296
19. Q&A15 of WSD3.
20. see NOE/392.
21. NOE/396.
22. NOE/262.
23. B2/252.
24. See B7/1195.
25. [2005] NSWCCA 119.
26. Q&A 8 of WSD3.
27. op. cit. footnote 25.
28. (2004) 59 NSWLR 284.
29. derived from PKNS's letter of 23 August 2006 at B7/254.
30. NOE/529-530.
31. See NOE/69-70.
32. NOE/342.
33. [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492; [1986] 1 MLRA 292.